Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

**No.**

~~79~~-1975

THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA,

*Petitioner,*

*vs.*

DONNY BRURELL BUCKLEY AND ALYCIA MARQUESE BUCKLEY, BY THEIR PARENT AND NEXT FRIEND, RUBY L. BUCKLEY, ON BEHALF OF THEMSELVES AND ALL NEGRO SCHOOL AGE CHILDREN RESIDING IN THE AREA SERVED BY THE ORIGINAL DEFENDANTS HEREIN; UNITED STATES OF AMERICA; THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA; ET AL.,

*Respondents.*

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## JOINT APPENDIX.

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(Additional Caption on Inside Cover)

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## TABLE OF CONTENTS.

### OPINIONS BELOW.


PAGE

Court of Appeals opinions dated April 29, 1980..... A1
Majority opinion..... A1
Dissenting opinion..... A28
Court of appeals opinions dated February 14, 1978..... A54
Opinion announcing judgment of court..... A54
Concurring opinion..... A79
Dissenting opinion..... A81
District court opinion dated July 11, 1978..... A84
District court opinion dated April 24, 1979.....A101


### JUDGMENTS BELOW.


District court judgment dated July 9, 1979.....A130
Court of appeals judgment dated April 29, 1980.....A136


### STATUTES INVOLVED.


Indiana Acts 1961, Ch. 186.....A138
Indiana Acts 1969, Ch. 52.....A151
Indiana Acts 1969, Ch. 173.....A154
Indiana Acts 1937, Ch. 207, as amended by Indiana Acts 1965, Ch. 384.....A168
Indiana Acts 1937, Ch. 209.....A168
42 U. S. C. § 1415.....A169

## APPENDIX.

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In the

# United States Court of Appeals

## For the Seventh Circuit

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Nos. 78-1800, 78-1871, 78-1996 through 78-2006, 78-2039, 78-2221, 79-1831 through 79-1838, 79-1874 and 79-1875

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY, etc.,

*Intervening Plaintiffs-Appellees,*

*vs.*

THE BOARD OF SCHOOL COMMISSONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al.,

THE METROPOPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA, et al.,

*Added Defendants-Appellants.*

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Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP 68-C-225—S. Hugh Dillin, *Judge.*

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ARGUED OCTOBER 25, 1979—DECIDED APRIL 29, 1980

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Before FAIRCHILD, *Chief Judge,* SWYGERT and TONE, *Circuit Judges.*

FAIRCHILD, *Chief Judge*. The Indianapolis School desegregation case is now entering its second decade.[1] It involves a municipality , the (present) City of Indianapolis, which contains within its borders more than a half dozen separate and autonomous school districts. Eight years ago the district court determined that the fourteenth amendment violations committed by the largest of those districts (the Indianapolis Public Schools-IPS) and the State of Indiana could be remedied only by a desegregation plan which would transfer students from IPS to the predominately white school districts which surround it.[2] After an appeal and a remand to the district court for further consideration,[3] we affirmed, finding that the standards of interdistrict relief established by *Milliken* v. *Bradley*, 418 U. S. 717 (1974) were met in this case, at least with regard to those districts within the (present) City of Indianapolis.[4] The Supreme Court vacated and remanded for further consideration in light of *Washington* v. *Davis*, 426 U. S. 229 (1976) and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977).[5] On reconsideration we reaffirmed our holding that certain acts of the State of Indiana, particularly in connection with the "UniGov" legislation which created the new city boundaries, had interdistrict effect, but remanded the case to the district court for findings of intent in light of the cases mentioned by the Supreme Court and evaluation of other issues, particularly regarding the location of public housing projects, in light of *Milliken, Arlington Heights,* and *Dayton Board of Education* v. *Brinkman (I)* (433 U. S. 406 (1977)).[6]

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1. Since this is the tenth opinion to be published in this case only the briefest summary of the facts of the case and its history is attempted here. Fuller descriptions may be found at 573 F. 2d 400 (7th Cir. 1978); 503 F. 2d 68 (7th Cir. 1974); and 332 F. Supp. 655 (S. D. Ind. 1971).

2. 368 F. Supp. 1191 (S. D. Ind. 1973).

3. 503 F. 2d 68 (7th Cir. 1974).

4. 541 F. 2d 1211 (7th Cir. 1976).

5. 429 U. S. 1068 (1977).

6. 573 F. 2d 400, *cert. denied,* 429 U. S. 1068 (1977).

In his most recent opinions, which are the ones now before us, the district court judge found that the exclusion of schools from the Uni-Gov legislative scheme was done with a racially discriminatory purpose. He found a similar racially discriminatory purpose in the failure of the Housing Authority of the City of Indianapolis (HACI) to build any units outside the old central city of Indianapolis despite legislative authority to do so. He also held that certain legislation[7] enacted by the Indiana legislature in response to his earlier decisions in the case allowed him to implement an interdistrict remedy without regard to the legislative intent questions posed by the Supreme Court and by our decision. He rejected, however, attempts by the intervening plaintiffs to establish that intradistrict violations by IPS had a segregative impact on housing patterns and school enrollment patterns throughout the city. He also denied requests by the United States and IPS to allow immediate implementation of an intradistrict remedy. On the issue of remedy he reaffirmed his earlier determination that the appropriate remedy is a student reassignment plan which would transfer black students from IPS to the other districts within the city until each of the surrounding districts is approximately 15% black and then reassign the remaining IPS students within IPS to achieve complete desegregation within the IPS boundaries. He also ordered that certain in-service training programs be implemented, with the cost to be borne by the State of Indiana, and made permanent his injunction against any expansion of public housing (except for the elderly) within the boundaries of IPS.

Although virtually all of these decisions are challenged by one or more of the parties to these appeals, the central issue remains the propriety of a desegregation plan that extends to those parts of the City of Indianapolis which are in separate and independent school districts outside the boundaries of the Indianapolis Public Schools. We will address that issue in Part I of the opinion, discussing in turn the evidence regarding Uni-Gov,

7. I. C. 1971, 28-8.1-6.5-1, *et seq.*

housing, and the interdistrict effects of segregation within IPS. In Part II we will turn to the other issues raised by the various appellants.

## I

As we noted in our last opinion (573 F. 2d 400), an interdistrict remedy such as that ordered by the district court must be predicated on a finding that official action, taken with a discriminatory purpose, was a substantial cause of interdistrict segregation. *Milliken* v. *Bradley*, 418 U. S. 717, 744-45 (1974); *Washington* v. *Davis*, 426 U. S. 229 (1976). The plaintiffs here pursued three independent avenues of proof in their attempt to make the requisite showings. The first centered around the exclusion of the Indianapolis Public Schools from the 1969 legislation which for most other purposes created a single metropolitan form of government for Marion County. The second concerned the governmental decision to locate all public housing projects within the old city of Indianapolis (and thus within the borders of IPS). The third was an attempt to prove that the *de jure* segregation of the IPS schools was in part responsible for the segregated housing patterns found throughout the county. The district court found that only the Uni-Gov and housing evidence supported an interdistrict remedy, rejecting as not credible the expert witnesses called by the plaintiffs in their attempts to establish the third point.

### *UNI-GOV*

In our last opinion we held that the exclusion of schools from the Uni-Gov legislation passed in 1969

> "meets the requirements of *Milliken* and can therefore be used as a basis for imposing an interdistrict remedy if the District Court finds the General Assembly, in enacting the series of legislation, acted with a discriminatory intent or purpose." 537 F. 2d 400, 408.

The district court has now found that the actions of the General Assembly "were done, at least in part, with the racially dis-

criminatory intent and purpose of confining black students in the IPS school system to the 1969 boundaries of that system, thereby perpetuating the segregated white schools in suburban Marion County." 465 F. Supp. 168. The appellants vigorously assert that there is no support in the record for that finding, disputing not so much the evidence itself, but rather whether, taken as a whole, it supports the district court's conclusion.

In its remand for consideration of the discriminatory purpose question, the Supreme Court referred us to *Washington* v. *Davis,* 426 U. S. 229 (1967) and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U. S. 252 (1977). *Washington* v. *Davis* sets forth the intent requirement, but says little about how it is to be met, apart from noting that

> "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than on another . . . Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."
> 426 U. S. 229, 242.

Justice Stevens, concurring, notes that the degree and type of proof needed to establish intent may vary considerably from one sort of case to another, and that

> "Frequently, the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decision-making, and of mixed motivation. It is unrealistic, on one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decision-maker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process."
> 426 U. S. 229, 253.

The *Arlington Heights* decision provides considerably more guidance. That decision calls for "a sensitive inquiry into such circumstantial and direct evidence as may be available" and then suggests as possible lines of inquiry, in addition to discriminatory impact, "the historical background of the decision," "the specific sequence of events leading up to the decision," "departures from normal procedural sequence," "substantive departures . . . particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached," and "legislative or administrative history." 429 U. S. 252, 266-268. With these guidelines in mind, we turn to the evidence on which the district court rested its decision.

Indianapolis and Marion County, before Uni-Gov, were not unlike dozens of other metropolitan areas throughout the country. The central city, Indianapolis, was losing population and becoming more predominately black and poor while the surrounding suburban areas were growing rapidly, but, with a few exceptions, remaining almost exclusively white. School enrollments were following a similar pattern. By 1970 IPS enrolled less than 60% of the county's total students, but over 97% of the black students in the county. These demographic facts of life, of course, can no more support a metropolitan desegregation plan here than could a similar pattern in Detroit (the focus of *Milliken* v. *Bradley*) or any other major city. They form an important backdrop, however, for the historical events, which are of somewhat more significance to this case.

As the district court noted, Indiana has had a long history of both public and private discrimination against its black citizens. This history has been described at length in earlier opinions and will not be repeated here, but ranged from state legislation which affirmatively sanctioned the *de jure* segregation of the Indianapolis Public Schools until 1949 to numerous instances of private housing discrimination, some of which were still being openly practiced past the date suit was filed. Other

official acts of discrimination included a prohibition on marriage across racial lines, not repealed until 1965; a requirement that only white males could serve in the militia, finally repealed in 1936; and a policy enforced until after World War II that blacks could enter state parks only on a segregated basis. The state was also implicated in the deliberate policies of segregation practiced by IPS, particularly with regard to its role in selection of sites for new schools.[8] These historical facts are not conclusive, of course, but may properly be considered by the court in its attempt to determine whether there was a discriminatory intent in the legislature's failure to include schools in the Uni-Gov consolidation.

Of greater relevance, however, is the history of school district expansion and consolidation in Indiana. As we have said in prior decisions,[9] Indiana has for generations pursued a legislative policy that school district lines should grow as the corporate lines of their cities grow. That policy was recognized by the Indiana courts as early as 1867[10] and was subsequently made explicit by legislation.[11] The policy was modified in 1959 to allow greater consolidation among Indiana's many small school districts[12] but was reaffirmed as to the Indianapolis district in particular by legislation enacted in 1961.[13] Although

8. These examples are taken from district court opinions published at 332 F. Supp. 655 (1971) and 368 F. Supp. 681 (1973).

9. See 573 F. 2d 400, 405-07 (7th Cir. 1978) and 541 F. 2d 1211, 1217-18, 1221-22 (7th Cir. 1976) *vacated and remanded on other grounds,* 429 U. S. 1068 (1977).

10. *Carson* v. *State to Use of Town of Hanover,* 1867, 27 Ind. 465, and cases cited in 332 F. Supp. 655, 675, n. 86.

11. Indiana Acts 1931, Ch. 94 § 1.

12. Indiana Act 1959, Ch. 202 (School Reorganization Act).

13. Indiana Act 1961, Ch. 186 (School Annexation Statute). The Act applied only to school corporations "located in whole or in part in a county containing a civil city of the first class." Since Indianapolis is the only first class city in Indiana, the Act applied only to Marion County. Section 9 of the Act provided for a presumptive expansion of school district boundaries whenever a "civil annexation" occurred. In fact, section 9 applied only to the school districts of Indianapolis, Speedway, and Beech Grove.

the legislation did not always achieve its stated purpose the policy it expressed was clear and although there was seldom a perfect correspondence between civil city and school boundaries the exceptions were generally in favor of larger, rather than smaller, school districts.

It was against this backdrop that the Uni-Gov legislation was enacted in 1969. Civil, as well as school annexations had become all but impossible to achieve because of opposition from the suburban areas which would be affected. Richard Lugar, then the Mayor of Indianapolis, along with other governmental and business leaders, was convinced that a country-wide governmental structure would be in the best interests of greater Indianapolis and conceived of Uni-Gov as a way of "sidestepping" the problems of direct annexation. The Uni-Gov legislation, officially entitled the "Consolidated First-Class Cities and Counties Act" included all of Marion County in a new governmental unit called the City of Indianapolis. All residents of the new city now vote in elections for mayor and members of the City-County Council. The new council has taken over most of the functions of county government (and of numerous special service districts) as well as the functions of the Common Council of the old City of Indianapolis. Some governmental units remain unchanged however. The airport authority, building authority, county courts, and hospital authority remain separately governed. There are special provisions for police and fire districts. In addition, the "excluded cities" of Beech Grove, Speedway, and Lawrence retain their own local governments and provide their own municipal services. Nonetheless the City-County Council has authority over building code enforcement, municipal planning, thoroughfare control, and air pollution regulation even in the "excluded cities" and the residents of those cities vote in Uni-Gov elections.

Under the 1961 Act, if the Uni-Gov legislation could be characterized as an extension of Indianapolis' civil city boundaries by civil annexation, it would have followed that the bound-

aries of IPS would have expanded to cover the area included in the new City of Indianapolis. Section 1(e) of the 1961 Act defines "civil annexation" as "any action whereby the boundaries of a civil city are extended." The Uni-Gov Act in turn defined the new boundaries of the "City of Indianapolis" as "all of the territory of a First Class City and of the County except for the territory located in Excluded Cities." Indiana Acts 1969, Ch. 173, § 102(f). Nevertheless the appellants argue vigorously that the Uni-Gov legislation was not such an annexation as defined by the 1961 Act and that therefore it is inappropriate to read any racially discriminatory intent into its limited scope. What convinces us that such a reading may be appropriate is the fact that the state legislature was sufficiently concerned about the possible expansion of IPS that might, under the 1961 Act, follow the enactment of the Uni-Gov legislation that it passed a special bill, just sixteen days before final passage of the Uni-Gov legislation, to repeal the applicable portions of the 1961 Act. As we have noted before, the repeal of section 9 of the 1961 Act appears to have been done in direct response to concerns that otherwise the boundaries of IPS would expand with the borders of the new City of Indianapolis. 573 F. 2d 400, 407 (7th Cir. 1978). We do not think that the Indiana legislature thought it was engaged in a futile act or that the repeal was unrelated to the Uni-Gov legislation then pending. As Mayor Lugar testified, the Uni-Gov legislation would not have passed if it would have meant that city and suburban school districts would be consolidated. Given the starkly segregated conditions then existing in Marion County it is also clear, as it must have been then, that the likely result of that special legislation would be a continuation of the racial disparity then existing between IPS and other school districts in Marion County.

The appellants nonetheless assert that there were valid, nonracial reasons for the repeal of the 1961 Act. They point particularly to evidence that both the Marion County School Re-

organization Committee in 1961, and IPS in 1967, had recommended that county-wide school consolidation not be pursued. Mayor Lugar testified that these recent rejections of a county-wide system were the reason that there was never any consideration of including schools in the Uni-Gov scheme, even though he personally thought, and argued, that it would be wise to have at least a county-wide common school tax. The opposition of IPS was apparently based largely on a determination that the district was better off financially with the students and tax base it already had than with the expanded tax base, but even more expanded long-term capital obligations, that would accompany consolidation. The reasons for the opposition of the Reorganization Committee are far less clear. The Committee originally supported a county-wide district and retreated from that position only when strong public opposition to consolidation was encountered. As the district court noted, however, the suburban districts throughout this period were engaged in a variety of cooperative ventures with each other, but never with IPS.

What this adds up to, we think, is the obvious conclusion that opinions about the merits of consolidation differed. On one hand there was the long-established, and recently reaffirmed, legislative determination that school boundaries, particularly in Marion County, should expand with civil city boundaries. On the other hand, there were those who felt that the students of Marion county were best served by smaller units of school government. The question is not whether one of these positions was racially invidious and the other not; the question is rather whether the legislative decision in 1969 to abandon its past policy in favor of the position advocated by the opponents of consolidation was done with a racially discriminatory purpose. The district judge considered the timing of the decision (shortly after this suit had been filed, signaling a likely end to the segregated conditions which had been prevailing within IPS), the history of state sanctioned discrimination against black students within IPS, the foreseeable impact of the decision on

the minority population of Indianapolis, and the predominately political, rather than educational, reasons for the decision and concluded that it was made with a discriminatory purpose.[14] We do not think any of those factors was improperly considered under *Washington* v. *Davis* or *Arlington Heights,* nor do we believe that the conclusion of discriminatory purpose was clearly erroneous in light of evidence of record. We therefore affirm the district court's determination that the 1969 repeal of the 1961 Act was done with a discriminatory purpose. We will discuss at a later point whether this finding supports the specific remedy ordered by the district court.

## *THE HOUSING VIOLATIONS*

In his concurring decision in *Milliken* v. *Bradley,* Justice Stewart explained

> "This is not to say, however, that an interdistrict remedy of the sort approved by the Court of Appeals would not be proper, or even necessary, in other factual situations. Were it to be shown, for example, that state officials had contributed to the segregation of the races . . . by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines . . . might well be appropriate.
>
> 418 U. S. 717, 755.

With specific reference to the facts before the Court in *Milliken* he noted that "[n]o record has been made in this case showing that the racial composition of the Detroit school population or that residential patterns within Detroit and in the surrounding areas were in any significant measure caused by governmental activity. . . ." 418 U. S. 717, 756. In our most recent remand opinion, we instructed the district court as follows:

---

14. The district court also received and considered other evidence presented on the question of racial motivation, including the statements of a black state legislator who testified that race was never considered in drafting the legislation at issue here. That testimony was properly considered by the district court judge but does not compel a result contrary to the one reached.

> [A]n interdistrict desegration remedy is appropriate if the following circumstances are shown to exist (given the fact that there is a vast racial disparity between IPS and the surrounding school districts within the "new" City of Indianapolis): (1) that discriminatory practices have caused segregative residential housing patterns and population shifts; (2) that state action, at whatever level, by either direct or indirect action, initiated, supported, or contributed to these practices and the resulting housing patterns and population shitfs; and (3) that although the state action need not be the sole cause of these effects, it must have had a significant rather than a *de minimis* effect. Finally, an interdistrict remedy may be appropriate even though the state discriminatory housing practices have ceased if it is shown that prior discriminatory practices have a continuing segregative effect on housing patterns (and, in turn, on school attendance patterns) within the Indianapolis metropolitan area.
>
> The record shows that the district court already has received evidence and has made certain findings in the area of housing discrimination. *See Indianapolis I*, 339 F. Supp. at 1204-05; *Indianapolis IV*, 419 F. Supp. at 183-85. It is important, however, that on remand the district court specify what state-responsible housing practices of a discriminatory nature, if any, have resulted, at least in part, in segregative residential patterns. This is necessary not only to determine initially whether an interdistrict remedy is appropriate, but also to fashion an appropriate remedy. 573 F. 2d 400, 409-10.

In addition, we made it clear that the intent requirement applied here as well, i.e., that the "official actions" must have been taken with a discriminatory purpose.

On remand, the district court, with one exception, did not attempt to determine how much, if any, of the current housing segregation within the new City of Indianapolis was caused by intentional state action rather than by non-discriminatory actions or by private acts of discrimination. In the absence of such findings, the history of past state involvement in housing

segregation, detailed at 332 F. 2d 655, 662-3, could not support the interdistrict remedy ordered by the court.[15] The question is narrowed therefore, to the one exception, which is the location of public housing within Marion County.

The Housing Authority of the City of Indianapolis (HACI) and the Metropolitan Development Commission of Marion County (Commission) have, since 1964, been responsible for the placement of public housing in much of Marion County. Under Indiana law in effect at the time, HACI's "area of operation" included all of the old City of Indianapolis as well as "the area within [5] miles of the territorial boundaries thereof." IC 1971 18-7-11-3. Of the eleven public housing projects in Marion County ten were built, mostly in the late 1960's, on sites selected by HACI and approved by the Commission.[16] Each of the eleven projects is within IPS. Those which house families are approximately 98% black.

It was obvious to the district court that the choice of location of those projects had an impact on school enrollments by keeping black students within IPS and out of the surrounding school districts. In our remand order we held that this presumably segregative impact could support an interdistrict school desegregation order only if a) the decision to locate public

15. IPS argues that the district court erred in not making the findings suggested by this court and urges us to find from our own review of the record a significant present impact on residential housing segregation caused by intentionally discriminatory state actions. The record is far from clear, however, and we assume that the district court judge understood our instructions when he decided to limit his discussion of housing issues to the placement of public housing. We note that many of the blatantly discriminatory housing practices described in 332 F. Supp. 655, 662-663 were private acts, e.g., refusals by real estate brokers to show homes in white neighborhoods to blacks, newspaper advertising that described certain homes as "for colored," and the harassment, sometimes violent, of blacks who did manage to purchase homes in white neighborhoods.

16. The eleventh project is the Lockfield Gardens project, built in 1936, for blacks, by the U. S. Public Housing Administration. The management of that project (which is now closed by order of the district court) was assumed by HACI in 1964.

housing within IPS was the result of a discriminatory purpose, either on the part of HACI or on the part of surrounding governmental units which may have resisted the placement of public housing in their communities, and, b) those decisions had a "substantial" interdistrict effect. 573 F. 2d 400, 410, 413-4. The district court has now made both of these findings. The question on appeal is whether the evidence supports the findings. We will discuss the intent findings now and the question of "substantial interdistrict effect" at a later point in the opinion.

The district court found as follows:

> "The action of . . . official bodies in locating such projects within IPS, as well as the opposition of suburban governments to the location of public housing within their borders, was racially motivated with the invidious purpose to keep blacks within pre-Uni-Gov Indianapolis and IPS, and to keep the territory of the added suburban defendants segregated for the use of whites only." 456 F. Supp. 183, 189.

These findings were based on the history of racial discrimination, both public and private, in housing in Marion County; on the natural and foreseeable results of the site selection practices; on the absence of convincing non-racial justifications for HACI's failure to locate projects outside of IPS; and on other actions by the Commission, not directly related to housing, which led the court to conclude that "the separation of the races, both in housing and in schools, has been an unspoken, but intentional, policy of the Commission." 456 F. Supp. 189.[17]

17. Judge Tone notes in the dissent that in the outlying areas of old Indianapolis, where most of these projects were built, existing housing was occupied predominately by white families. The district court, however, specifically denied the 1971 request by the government to find that the placement of housing in those areas tended to promote integration. 332 F. Supp. 655, 674, n. 81. (S. D. Ind. 1971). In any event, for the purpose of this appeal, the critical finding by the district court is the one quoted above, the finding of "an invidious purpose to keep blacks within pre-Uni-Gov Indianapolis and IPS, and to keep the territory of the added suburban defendants segregated for the use of whites only."

The district court's findings have ample support in the record. At least five of the ten housing projects built during the 60's were located on or just a few blocks within the IPS-suburban boundary. Others are close-by. All, however, are within IPS. One project was built just across the street from Warren township (then 98% white). Another was located on land that was once a part of Wayne township (then 99% white), but was annexed by the old city, at HACI's request, over the objections of the IPS Superintendent that existing school facilities were inadequate to serve the project. The judge considered the reasons offered by HACI to explain this striking pattern and found none of them convincing. He also noted that the Commission, which selected or approved all the sites, had already been implicated in the *de jure* segregation of Crispus Attucks High School (for decades the official high school for black students within IPS) by its refusal to allow IPS to use land in a white neighborhood for a new Attucks High School.[18]

HACI and the suburban defendants have argued here, as they did in the court below, that public housing could not have been built outside the limits of IPS absent a "cooperation agreement" with the appropriate suburban government. The Federal Housing Act which provided the funds for the HACI projects did, at that time, require a cooperation agreement with "the locality involved."[19] The district court found the federal statute irrelevant, holding that the "locality involved" was the governmental authority which had chartered the housing authority, here the (old) City of Indianapolis. We agree that in this case cooperation agreement requirement is irrelevant, but for a somewhat different reason.

It was HACI's position at trial that it could not build public housing outside the old city of Indianapolis, despite its statutory authority to do so, without additional cooperation agreements.

18. *See* 332 F. Supp. 655, 674 (1971).

19. United States Housing Act of 1937, as amended, c. 338. Title III § 301, 63 Stat. 422 (1949).

The evidence at trial, however, disclosed no serious attempts by HACI to obtain those cooperation agreements. Instead it showed that HACI never considered placing traditional public housing outside of the old city limits. The Deputy Mayor of Indianapolis, who had been a planner for the Metropolitan Planning Department when sites were selected and who had recommended sites to a task force charged with site selection, testified that the criteria used "automatically excluded looking outside the corporate limits of the [old] City of Indianapolis." But the trial judge, who heard the witnesses, found the "criteria" defense not credible and concluded, on the evidence before him, that the only reason sites outside the old Indianapolis were not considered was because the responsibile agencies were pursuing a deliberate policy of racial segregation. On these facts, then, it makes no difference whether or not additional cooperation agreements may have been required. It was HACI's own decision to limit the projects to IPS—that decision was not forced on it by the refusal of some other governing body to enter into a cooperation agreement.

We therefore affirm the district court's finding that the decision in the '60's to locate all public housing in Marion County within the boundaries of IPS was the result of a segregative intent by the responsible state agencies. We will discuss at a later point in the opinion the appellants' contention that the placement of all public housing within IPS did not have a "substantial" interdistrict effect.

## *INTERDISTRICT EFFECTS OF INTRADISTRICT SEGREGATION*

In an effort to support a remedy that would extend beyond its own boundaries, IPS presented expert testimony in an attempt to establish that the *de jure* segregation of the schools within the old City of Indianapolis, as found by the district court in an earlier decision (332 F. Supp. 655) and affirmed by us (474 F. 2d 81, *cert. denied*, 413 U. S. 920 (1973)), had resulted in

segregated housing and/or school enrollment patterns throughout the metropolitan area.[20] In offering that proof IPS was relying on Chief Justice Burger's statement in *Milliken* v. *Bradley* that

> "Before the boundaries are separate and autonomous school districts may be set aside . . . it must first be shown that there has been a constitutional violation in one district that produces a significant segregative effect in another district. 418 U. S. 717, 745 (1974).

The essence of the expert's testimony was that the acts of *de jure* segregation practiced within IPS identified certain geographic areas of Marion County (all within IPS) as "black" areas and that correspondingly other areas beyond, as well as within, the limits of the school district became identified as "white" areas. Private housing choices then followed these quasi-official neighborhood designations. Since all of the "black areas" were within IPS that necessarily meant that a disproportionate number of the "white" areas were in the outlying school districts. Since school enrollment patterns so closely reflect residential population patterns, it could then be said that the predominately white school enrollments of the outlying districts were caused in significant part by the intentional acts of segregation practiced within IPS.

The expert's theory is not implausible. The district judge, however, after hearing the testimony, rejected it as not credible, citing both the general nature of much of the testimony and the weakness of statistical support for the conclusions regarding Marion County. No. IP-C-225 (S. D. Ind. April 24, 1979). On review of the record, we cannot say that the district court's

20. Technically this evidence was received solely on the question of what sort of interdistrict remedy might be appropriate in this case: *i.e.*, in the "remedy" rather than the "liability" phase of the proceedings below. In a discussion of a school desegregation plan that crosses district lines, however, the line between liability and remedy is not always distinct and since the evidence, if accepted might support the district court's decision to impose a city-wide desegregation order, it is being discussed at this point in our opinion.

rejection of the expert's testimony was improper. We therefore do not disturb the finding that the effects of school segregation within IPS cannot support the city-wide desegregation plan ordered by the district court.

## *THE INDIANA TRANSFER STATUTE*

The district court also relied on an Indiana statute, IC 1971 20-8.1-6.5, as a basis for the city-wide remedy.[21] This statute was enacted by the Indiana legislature in 1974 in response to an earlier order of the district court in this case.[22] It is entitled "Regulations Regarding Transfers of Pupils by School Corporations Pursuant to Court Order" and, by its terms, applies "solely" to situations where a state or federal court has found (and all appeals have been exhausted) that

> "(a) a transferor corporation has violated the equal protection clause of the fourteenth amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders;
>
> "(b) a unitary school system within the meaning of such amendment cannot be implemented within the boundaries of the transferor corporation; and
>
> "(c) the fourteenth amendment compels the court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation which is acceptable within the meaning of such amendment."

In relying on this statute as an independent source of authority for its city-wide transfer plan, the district court judge held that these three conditions had all been established. 456 F. Supp. 183, 191.

Regardless of whether or not these conditions had been established in this case, however, it is clear from the face of

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21. 465 F. Supp. 191.

22. 368 F. Supp. 1191, 1205 (1973).

the statute that it is procedural only—designed to provide a mechanism for student transfers in cases where those transfers are ordered to remedy fourteenth amendment violations. It is not an independent source of authority to require student transfers and cannot, standing alone, be the basis for a desegregation order. The statute becomes applicable to this case only because we affirm the district court's finding that there were intentional state acts which had a significant impact across district lines.

*THE SCOPE OF THE REMEDY*

Having concluded that only the Uni-Gov and housing violations meet the tests of *Milliken* and *Arlington Heights,* we must next consider whether those constitutional violations are appropriately remedied by the specific desegregation plan ordered by the district court.

The district court's plan calls for the transfer of slightly more than six thousand IPS students to eight other school districts within the city. The students remaining in the IPS schools would then be reassigned within IPS, under a plan not yet specified, to the extent necessary to eliminate racially identifiable schools. The various non-IPS defendants, relying primarily on *Dayton Board of Education* v. *Brinkman (I),* 433 U. S. 406 (1977), assert that this plan goes too far. The intervening plaintiffs, noting that the plan does not call for the reassignment of any non-IPS students to IPS schools, assert that it does not go far enough. We will address each of these contentions in turn.

Our most recent opinion remanding this case to the district court was written shortly after the Supreme Court had issued its first decision in *Dayton Board of Education* v. *Brinkman,* 433 U. S. 406 (1977) ("Dayton I"). In that case Justice Rehnquist spoke of the duty of the district court to "determine how much incremental segregative effect" specific constitutional violations had on the racial distribution of pupils "when that

distribution is compared to what it would have been in the absence of such violations" and to design a remedy "to redress that difference." 433 U. S. 406, 420. Therefore, although we observed that the district court had apparently kept in mind the principle that a remedy must be tailored to fit the nature of the violation, we urged the court on remand to "explicitly" consider it. 573 F. 2d 400, 415.

Judge Dillin attempted to determine a precise number of children who would have received a desegregated education "but for" the failure of HACI to build public housing in the area outside IPS. 456 F. Supp. 183, 196. With respect to Uni-Gov, however, he concluded that it would be impossible to determine the incremental effect of the legislation since Uni-Gov would not have been passed if the schools had not been excluded from its scope. We will address the Uni-Gov questions first.

The difficulties in attributing specific incremental effects to the Uni-Gov violation do not mean that that violation cannot support an interdistrict remedy. In more recent cases the Supreme Court has described as a "misunderstanding" of *Dayton I* the view that a party must prove "with respect to each individual act of discrimination precisely what effect it has on current patterns of segregation" (*Dayton Board of Education* v. *Brinkman (II)*, ..... U. S. ....., 99 S. Ct. 2971, 2981 (1979). The Court has quoted with approval the Sixth Circuit's holding that "policies of systemwide application necessarily have systemwide impact." (*Columbus Board of Education* v. *Penick*, ..... U. S. ....., 99 S. Ct. 2941, 2951 (1979), *quoting Penick* v. *Columbus Board of Education*, 583 F. 2d 787, 814 (6th Cir. 1978)), and has reaffirmed the basic rule that "a remedy imposed by a court of equity should be commensurate with the violation ascertained." *Columbus Board of Education* v. *Penick*, ..... U. S. ....., 99 S. Ct. 2941, 2950.

It is now clear, if it was ever in doubt, that the "incremental effects" test applies only to cases where discrete isolated ex-

amples of discrimination are established. Proof of systemwide discrimination, in contrast, still calls for a systemwide remedy. It is the latter that we have here. The decision to prevent IPS from expanding with the City of Indianapolis was a decision affecting the city as a whole, not just certain schools or certain school districts within the city.[23] We do not have a situation such as that presented in Denver, or Dayton, or Columbus, where the discriminatory actions took place one at a time, often affecting just one school at a time, and the courts had to determine whether, taken together, they permitted an inference of discriminatory intent as to the district as a whole. *Keyes* v. *School Dist. No. 1,* 413 U. S. 189 (1973); *Columbus Board of Education* v. *Penick,* ..... U. S. ....., 99 S. Ct. 2941 (1979); *Dayton Board of Education* v. *Brinkman (II),* ..... U. S. ....., 99 S. Ct. 2971 (1979).[24]

Nor is it relevant that without the companion legislation freezing IPS boundaries Uni-Gov never would have been enacted. Once the state chose to act it was obligated to do so in a non-discriminatory manner. *Evans* v. *Buchanan,* 393 F. Supp. 428, 443 (D. Del.) *aff'd* 423 U. S. 963 (1975). Our case fits squarely within the rule of *Milliken* that "where district lines have been drawn on the basis of race . . . an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violations." 418 U. S. 717, 745. We reject therefore the claim of

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23. We are mindful of the contentions of the school districts of Speedway and Beech Grove that they were not affected by the exclusion of schools from the Uni-Gov legislation and that therefore their inclusion in the interdistrict remedy ordered by the court was inappropriate. We will discuss their situation at a later point in the opinion.

24. Although it is appropriate to discuss the *Dayton II* and *Columbus* cases in light of our earlier discussion of *Dayton I,* we do not rest our decision on either case. Both dealt with single school districts only and it is not necessary that we attempt to extend their discussions of affirmative duties to desegregate or burdens of proof to this multi-district situation.

those appellants who assert that the remedy ordered by the court went too far.

A remedy must still be tailored to fit the violation and an interdistrict remedy must still attempt to respect local autonomy and local political processes. *Milliken* v. *Bradley,* 418 U. S. 717 (1974); *Hills* v. *Gautreaux,* 425 U. S. 284 (1976). Here the district court ordered the implementation of a transfer plan which would preserve the independence of the individual school districts while still attempting to remedy the violation found. It has been suggested that this is not the remedy most closely tailored to the violation. We tend to agree. The most closely tailored remedy would likely be one that would allow IPS to expand to the city borders. Confronted with a nearly identical violation, that was the remedy ordered by a three judge district court in Delaware. *Evans* v. *Buchanan,* 416 F. Supp. 328 (D. Del.) *aff'd* 555 F. 2d 373 (3rd Cir.) (*en banc*), *cert. denied,* 434 U. S. 880 (1977); *see also, Morrilton School District No. 32* v. *U. S. A.,* 606 F. 2d 222, 229 (8th Cir. 1979) (*en banc*). Such a remedy might well have been appropriate here. It also, however, would have been far more intrusive into local political processes. Under the circumstances we cannot say that the trial judge violated his obligation to weigh these competing considerations or abused his discretion in developing a remedy.

The transfer plan is also an appropriate remedy for HACI's decision, for racially discriminatory purposes, to place all public housing projects within IPS. The connection between that policy and suburban housing and school enrollment patterns is obvious. It, like the Uni-Gov violation was not limited to a single school or even to a single school district. It was a general policy which affected housing and school patterns throughout HACI's area of operation. Ten public housing projects, with units for over 1600 families, were built by HACI pursuant to this policy. In addition, as the court found, once a public housing project was opened other blacks tended to settle in the area around the project, thus multiplying the effect which the project

had already had on the racial composition of neighborhood schools. While appellants may be correct in their claim that the judge miscalculated the exact number of students affected by the violation, we cannot agree that the number of students affected is so small that the violation can be said to be insignificant. We do note, however, that if this were the only constitutional violation present in this case, an appropriate remedy on this record would have to be limited to the territory within HACI's area of operation at the time the projects were built.

There are, nevertheless, two aspects of the transfer plan that require further discussion. The first is the "one-way" remedy ordered by the district court. Under this plan black students from IPS are to be transferred from IPS to other districts in the city but no students from other districts are to be transferred to IPS. Many white students within IPS will be reassigned to other schools within the district, however, so that it cannot be said that only minority students will bear the burden of the remedy imposed by the court. The court also considered the generally better facilities available in the outer districts as compared to IPS and the fact that reducing the student population of IPS would allow that district to close some obsolete schools. Therefore, despite our concerns about the possible inequities of the plan, we are not prepared to say that it was such a clear abuse of discretion that it must be set aside in favor of a two-way plan.

We do note, however, that among the reasons the court listed for rejecting a two-way plan suggested by IPS was the court's conclusion that it had "no power to order a suburban child be transported out of its own school corporation as long as the suburban school corporations remain as separate legal entities, because there is no evidence that any of them has operated anything other than a unitary school system." (No. IP 68-C-225 S. D. Ind. Memorandum Decision, July 9, 1979). In so holding, the district court was in error. There is no distinction that can be made between the court's power to order districts to

accept transfer students from IPS and its power to order students from those districts to transfer to IPS schools. In both cases the power depends not on the culpability, or lack thereof, of the suburban districts involved but rather on the finding that discriminatory actions by the state had a significant segregative impact across district lines. The court does, then, have the power to implement a plan which would reassign students from non-IPS districts to IPS schools. We will not vacate the plan as ordered but will instruct the district court that it does have this power and should feel free to use it if modifications of the plan become necessary.

There is one other matter that requires further consideration by the district court. The school town of Speedway and the school city of Beech Grove both assert that their peculiar status under both Uni-Gov and the state law from which HACI draws its authority make it inappropriate to include them in a city-wide remedial plan, regardless of whether or not such a plan is otherwise appropriate. Without finally determining the merits of those claims, we think they are substantial enough to require separate consideration by the district court.

The special status of the cities of Speedway and Beech Grove under the Uni-Gov Act is not in dispute. The Act defines them as "excluded cities" and they are technically not a part of the "new" City of Indianapolis. IC 18-4-1-2(f). Nevertheless, as we have noted previously, the consolidated government was given "significant powers even in the excluded cities." 541 F. 2d 1216. The hybrid status of the communities is reflected in their political structure: each community has its own elected government but the residents of each also vote in Uni-Gov elections. *See Dortch* v. *Lugar*, 255 Ind. 545 (1971). In each case the school district's boundaries are coterminous with the civil boundaries. The appellants make a strong showing that Indiana law prior to Uni-Gov, despite its policy in favor of school district expansion following civil expansion, would not have permitted IPS expansion into Speedway and Beech Grove. The two cities

therefore assert that since their schools were unaffected by the violation a remedy which includes them goes beyond the violation shown.

We think the issue is not quite as simple as Speedway and Beech Grove present it. As they present the argument, unilateral civil annexation of Speedway and Beech Grove by Indianapolis was prohibited by Indiana law. Therefore, the City of Indianapolis could not expand into their communities. Therefore, even if it was state policy to allow school boundaries to expand with civil boundaries, the barrier to unilateral civil annexation would have prevented IPS from ever expanding into their communities.

But despite all the barriers to annexation established generally by Indiana law prior to Uni-Gov, the Uni-Gov legislation did allow the City of Indianapolis to expand to the borders of Marion County. And specifically Speedway and Beech Grove, despite their protected status under pre-Uni-Gov annexation law and despite their categorization "as excluded cities" under Uni-Gov, nonetheless became subject to the authority of the Uni-Gov government for many purposes.[25]

The question then is not whether Indiana law prior to Uni-Gov would have permitted the expansion of IPS into Speedway and Beech Grove but rather whether, if the Uni-Gov legislation had not generally excluded schools, it would have nonetheless excluded the schools of Speedway and Beech Grove.

It also appears likely that HACI's area of operation did not include the City of Beech Grove and may not have included the Town of Speedway as well. Prior to 1969, the area of operation of a city housing authority was defined so as to exclude "any area which lies within the territorial boundaries of some other city as herein defined." "City," in turn, was defined in the Act as "any city." *Indiana Acts*, 1973, Ch. 207, Sec. 3.

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25. We also note that the Uni-Gov legislation, while to a large extent preserving the separate identities of Speedway and Beech Grove, did modify the absolute bar to unilateral annexation which had previously existed. IC 1971 18-4-15-1.

Beech Grove was, and is, incorporated as a city under Indiana law. Speedway was a town. The 1969 amendments to the Act expanded on this, stating that a city housing authority's area of operation would not include "another city or town [or] the area of operation of the housing authority of another city or town." I. C. 15-7-11-3(g). This raises several questions. The most obvious is whether HACI's pre-1969 area of authority may have included the Town of Speedway but not the City of Beech Grove. Whie the two communities appear to be similarly situated with respect to Uni-Gov they may be in different positions with respect to HACI. In either case, however, the requirement that a remedy be tailored to fit the violation means that their inclusion in the district court transfer plan may be inappropriate.

These substantial questions have not been fully briefed. Nor have they been addressed by the district court judge, whose familiarity with the relevant Indiana statutes greatly exceeds ours. We will therefore continue our stay of that portion of the order which requires the transfer of students into the Speedway and Beech Grove schools and remand the case with instructions to the district court to include them in the final order only on a finding that either the Uni-Gov or the HACI violations affected their districts.

To summarize the decision thus far, we find two grounds of support for the remedy ordered by the district court. The first is the state's affirmative decision, made for a discriminatory purpose, to limit the boundaries of IPS to the old city limits of Indianapolis. The second is HACI's decision, again for discriminatory purposes, to locate all public housing within IPS territory. We hold, however, that the Indiana student transfer statute does not provide an independent basis of support for the interdistrict remedy. The specific reassignment plan ordered by the district court judge is generally found not to be an abuse of discretion, although modification may be in order and although the School Town of Speedway and the School City of Beech

Grove are, at least for the time being, removed from the scope of that order. We will now consider the various other issues presented on appeal.

## II

### *COST OF ANCILLARY PROGRAMS*

The state of Indiana appeals from the order of the district court requiring it to pay for certain ancillary relief (in-service training programs, etc.) ordered by the court. The Supreme Court has considered similar objections raised by a state in another case and expressly rejected them. *Milliken* v. *Bradley (II)*, 433 U. S. 267 (1977). We affirm the district court's holding in this regard.

### *INTRADISTRICT RELIEF*

In April of 1978 the district court denied a request by IPS to adopt an intradistrict plan pending resolution of the question of interdistrict relief. The United States, which was supporting the IPS proposal, appealed. We vacated the April order and ordered further consideration of the IPS proposal. On June 2, 1978, after a hearing, the district court again denied the IPS request. Both IPS and the United States appealed. In July we ordered the district court to allow IPS to implement the high school (phase I) portion of the plan. The rest of the appeal was retained. We now consider whether it was an abuse of discretion for the district court to reject the IPS plan for interim intradistrict relief for upper (phase II) and lower (phase III) elementary schools within the district. There is no question that desegregation of students within IPS is long overdue. The district court judge's fear that an interim plan of desegregation would legally preclude eventual interdistrict desegregation is groundless. His concern that a plan limited to IPS would lead to white flight is, as we have stated before, irrelevant. 503 F. 2d 68, 80. Nevertheless, there also appeared to be valid reasons for the court's

reluctance to approve the specific plan set forth by IPS: the lower elementary school plan was only a very sketchy outline of a hurriedly-adopted proposal and the upper elementary plan required two new buildings as well as remodeling of present facilities. Under these circumstances the court's refusal to adopt the phase II and phase III plans was not an abuse of discretion.

We are informed that more specific revised plans have now been submitted to the district court. It goes without saying that an intradistrict plan *must* be put into effect along with the interdistrict plan we approve today. In addition, we can think of no reason why an intradistrict plan should not be implemented in September 1980 regardless of the status of the interdistrict remedy at that time. The district court judge is instructed to give priority to the development of such a plan.

### *THE INJUNCTION AGAINST HACI*

In Part I, we affirm the trial court's finding that HACI acted with a discriminatory purpose when it decided to locate all public housing projects within the old city of Indianapolis. The injunction against HACI, preventing it from building any low-rent housing within IPS, rests on the same evidence and is not otherwise contested. For the reasons already discussed, we affirm the injunction.

## III

The judgments entered against the School City of Beech Grove and the School Town of Speedway are vacated and remanded for further consideration in accordance with this opinion. In all other respects the judgments appealed from are affirmed.

TONE, *Circuit Judge,* dissenting. For nearly half of the twenty-six years since *Brown* v. *Board of Education of Topeka,*

347 U. S. 483 (1954), the *Indianapolis School* case has been in the federal courts.[1] It will soon be nine years since the district court found *de jure* segregation in the Indianapolis Public School System. We affirmed that judgment, and almost seven years ago the Supreme Court denied certiorari.[2] I join in the majority's statement that "we can think of no reason why an intradistrict plan should not be implemented in September 1980 regardless of the status of the interdistrict remedy at that time," and in the directive to the district court to "give priority to the development of such a plan." *Ante* at 28. In this second decade of the litigation, the results of *de jure* segregation in the Indianapolis Public School System should not continue to remain in substantial part unremedied.

Looking back, the long delay, during which a generation of children have passed through segregated schools in Indianapolis, seems to me to be the fruit of a search for an elusive constitutional violation capable of supporting an interdistrict remedy that, the district court has often said, promises desegregation in fact as well as in law. Anyone familiar with the history of this case knows the determination with which the district court has pursued that goal. The court has said time and again that a remedy confined to the "IPS strait jacket" will produce a student population in excess of forty percent black, will in all probability exceed

1. The case was filed on May 31, 1968. Its progress may be charted as follows: *United States* v. *Board of School Comm'rs of Indianapolis*, 332 F. Supp. 655 (S. D. Ind. 1971) (*Indianapolis I*), *aff'd*, 474 F. 2d 81 (7th Cir.), *cert. denied*, 413 U. S. 920 (1973); *United States* v. *Board of School Comm'rs of Indianapolis*, 368 F. Supp. 1191 (S. D. Ind.) (*Indianapolis II*), *supp. mem. of decision*, 368 F. Supp. 1223 (S. D. Ind. 1973) (*Indianapolis III*), *aff'd in part, rev'd in part, and remanded*, 503 F. 2d 68 (7th Cir. 1974), *cert. denied*, 421 U. S. 929, *on remand*, 419 F. Supp. 180 (S. D. Ind. 1975) (*Indianapolis IV*), *aff'd*, 541 F. 2d 1211 (7th Cir. 1976), *vacated and remanded*, 429 U. S. 1068 (1977), *on remand*, 573 F. 2d 400 (7th Cir.), *on remand*, 456 F. Supp. 183 (S. D. Ind. 1978) (*Indianapolis V*). This sequence excludes the many unpublished orders involved in the case.

2. *Indianapolis I*, 332 F. Supp. 655 (S. D. Ind. 1971), *aff'd*, 474 F. 2d 81 (7th Cir.), *cert. denied*, 413 U. S. 920 (1973).

an indefinable "tipping point," will thus cause accelerating and irreversible "white flight" from IPS, and will, finally, produce nothing of lasting value for a city still in search of its first unitary school system. All this may be correct, *cf. Milliken* v. *Bradley*, 418 U. S. 717, 732-35, 739 (1974), but, as the district court once recognized, the federal courts may impose an inter-district remedy only "if this can be done within the law." The long effort to prove that it can in Indianapolis seems to me to have failed.

When we last remanded this case to the district court, we did so in pursuance of the Supreme Court's mandate that the case be reconsidered in light of *Washington* v. *Davis*, 426 U. S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977).[4] Those then recent decisions make it clear that state action taken without discriminary purpose does not violate the equal protection clause. On remand, the district court held no further evidentiary hearing on the issue of discriminatory purpose; it discovered the requisite purpose on the existing record, which a majority of this court apparently had considered insufficient.[5] Today we affirm on the basis of that record.

The record no more supports today than it did four years ago the thesis that either the passage of Uni-Gov or the actions of the Housing Authority were tainted by discriminatory purpose. I have stated in prior dissents[6] the reasons that led me then to conclude that invidious purpose had not been proved; a third look at the increasingly familiar transcript of the 1975 trial

3. *Indianapolis II*, 368 F. Supp. at 1199.

4. *Indianapolis IV*, 573 F. 2d 400 (on remand from 429 U. S. 1068 (1977)).

5. *Indianapolis IV*, 573 F. 2d at 410-11 (Swygert, J.); *id.* at 415 (Fairchild, C. J., concurring); *id.* (Tone, J., dissenting); *but cf. id.* at 404 (Swygert, J.).

6. *Indianapolis IV*, 541 F. 2d at 1224 (Tone, J., dissenting); *Indianapolis IV*, 573 F. 2d at 415 (Tone, J., dissenting) (on remand from the Supreme Court).

does not persuade me otherwise.[7] Without repeating, I hope too much of what I earlier said, I feel compelled to add what follows.

*The Applicable Law*

"[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Washington* v. *Davis, supra,* 426 U. S. at 240. Though discriminatory purpose need not be the "dominant" or the "primary" motive force of the official act in question, *Village of Arlington Heights* v. *Metropolitan Housing Development Corp., supra,* 429 U. S. at 265, the concept "implies more than intent as volition or intent as awareness of consequences. It implies

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7. The clearly erroneous standard is applicable to the district court's findings of discriminatory purpose. *Columbus Bd. of Educ.* v. *Penick,* ..... U. S. ....., ....., 99 S. Ct. 2941, 2945 (1979); *id.* at ....., 99 S. Ct. at 2952 (Burger, C. J. concurring); *id.* at ....., 99 S. Ct. at 2983 (Stewart, J., concurring and dissenting); *Dayton Bd. of Educ.* v. *Brinkman,* ..... U. S. ....., ..... n. 8, 99 S. Ct. 2971, 2977-78 n. 8 (1979) (*Dayton II*). *But cf. Columbus Bd. of Educ.* v. *Penick,* ..... U. S. at ....., 99 S. Ct. at 2953-54 (Rehnqiust, J., dissenting). *See also id.* at ..... n. 6, 99 S. Ct. at 2946 n. 6 (opinion of the Court).

I take the standard to mean here, as elsewhere, that district court findings must stand unless we can form a "definite and firm conviction," on the record, that they are in error. Fed. R. Civ. P. 52(a); *United States* v. *United States Gypsum Co.,* 333 U. S. 364, 395 (1948); *Apolskis* v. *Concord Life Ins. Co.,* 445 F. 2d 31, 34 (7th Cir. 1971). As the *Dayton* and *Columbus* cases make clear, school desegregation cases are not subject to a special "laissez-faire theory of appellate review," *Dayton Bd. of Educ.* v. *Brinkman, supra,* ..... U. S. at ....., 99 S. Ct. at 2982 (Rehnquist, J., dissenting). Moreover, our duty of deference with respect to facts found in the district court is qualified by our especially heavy duty, in a constitutional case, to make an "independent examination" of the record. *Cf. New York Times Co.* v. *Sullivan,* 376 U. S. 254, 285 (1964). We must ascertain whether the evidence adduced supports the conclusion drawn under the controlling principles of law.

> The duty of both the District Court and the Court of Appeals, in a case such as this, . . . is to first determine whether there was any [state] action . . . which was intended to, and did in fact, discriminate against minority pupils. . . .

*Dayton Bd. of Educ.* v. *Brinkman,* 433 U. S. 406, 420 (1977) (*Dayton I*).

that the decisionmaker, . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator* v. *Feeney*, ..... U. S. ....., ....., 99 S. Ct. 2282, 2296 (1979) (citation omitted). "[D]isparate impact and foreseeable consequences, without more, do not establish a constitutional violation." *Columbus Board of Education* v. *Penick*, ..... U. S. ....., ..... 99 S. Ct. 2941, 2950 (1979); *see Dayton Board of Education* v. *Brinkman*, ..... U. S. ....., ..... n. 9, 99 S. Ct. 2971, 2978 n. 9 (1979) (*Dayton II*).[8]

The burden of proving discriminatory purpose is, initially, on the plaintiff. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp., supra,* 429 U. S. at 270; *Washington* v. *Davis, supra,* 426 U. S. at 241. "Proof that the [state] decision . . . was motivated in part by racially discriminatory purpose . . . shift[s] to the [state] the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. at 270 n. 21.

In determining the presence of discriminatory purpose, the following factors are relevant, though not exhaustive:

> The historical background of the decision . . ., particularly if it reveals a series of official actions taken for invidious purposes.
>
> The specific sequence of events leading up to the challenged decision . . . .
>
> Departures from the normal procedural sequence . . . .
>
> Substantive departures . . ., particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

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8. As the majority recognizes, this case does not involve the sort of stark pattren of disproportionate racial effect that may, without more, give rise to an inference of discriminatory purpose. *See Village of Arlington Heights* v. *Metropolitan Housing Development Corp., supra,* 429 U. S. at 266; *see also Washington* v. *Davis, supra,* 426 U. S. at 254 (Stevens, J., concurring).

> The legislative or administrative history . . ., especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action . . . .

*Id.* at 267-68.

*Uni-Gov*

The district court found no procedural irregularities in the passage of Uni-Gov. *Indianapolis V*, 456 F. Supp. at 188. So far as I can determine, the court found nothing in the "historical background of the decision" to adopt Uni-Gov[9] indicating "a series of official actions taken for invidious purposes." The "specific sequence of events" that led to Uni-Gov seems blameless.[10] The legislative history of the Act indicates that no discriminatory purpose was at work.[11] Of the five factors spelled out in

9. The district court's discussion of historical background was, in the main, limited to a general survey of past discrimination in Indiana. It was not focused on the history "of the decision" to adopt Uni-Gov. *Indianapolis V*, 456 F. Supp. at 186-87. Quite apart from what appear to be serious questions concerning the record support for some of the district court's historical findings, the fact that Indiana, like most if not all other states in the Union, has a history of past acts of discrimination does not, in my view, lend much weight to the conclusion that the present generation of Indiana public officials, or the public they represent, has learned nothing from the lessons of the past.

10. I can find nothing in the district court's consideration of the "specific sequence of events" leading to Uni-Gov that would support an inference of invidious purpose. *See id.* at 187. For example, although the district court found otherwise, Mayor Lugar's testimony indisputably contains numerous "educational or governmental" reasons for excluding schools from Uni-Gov. *See* notes 11 & 12 *infra*.

11. State Representative Ray Crowe, who is black, served on the Indiana House Committee on the Affairs of Marion County in 1969, when Uni-Gov was debated by that committee. He testified at trial, in response to a question that asked if race had been a factor in excluding schools from Uni-Gov: "I am positive race did not enter into the discussions or reasons whatsoever." [1975 Tr. 51.] *See also*

(Footnote continued on next page.)

*Arlington Heights,* the district court found one, "sustantive departures," dispositive of the issue. Even here, the court did not inquire, as *Arlington Heights* directs, 429 U. S. at 267-68, whether the "factors usually considered important by the decisionmaker strongly favor[ed] a decision contrary to the one reached." It is apparent that they did not.[12] Nor did the district

(Footnote continued from preceding page.)
note 12 *infra.* Two members of the Metropolitan Planning Commission that participated in the development of the Uni-Gov proposal were also black. [1975 Tr. 60-61.]

Then Mayor, now Senator, Lugar testified at trial that his task force for the planning of Uni-Gov discussed the inclusion of schools only briefly and rejected the idea out of hand because, first, under the 1959 School Corporation Reorganization Act, *see* note 31 *infra,* officials had already thoroughly considered and rejected the idea of a county-wide school system, *see* notes 12 & 14 *infra,* and, second, the administration of schools had traditionally been handled separately from the administration of civil government. [1975 Tr. 164.] Lugar testified after having reviewed the minutes of the task force meetings. [*Id.* at 163.] *Cf. Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U. S. 252, 268 (1977).

12. As is clear from even a cursory study of the history of school district boundaries in Indiana, one factor of great importance has always been school financing. Mayor Lugar testified at trial that IPS opposed expansion of its boundaries because "it would be to the disadvantage of the Indianapolis Public School System if the tax base was county-wide." [1975 Tr. 181.] He further observed that, at the time reorganization of the school systems was considered, Indianapolis had already built its schools, but that the same was not true of the suburbs. Expansion would have caused city taxpayers to assume the burden of financing the construction of suburban schools and would thus have been "unfair." [*Id.* at 183.] In 1967, the Board of School Commissioners of IPS adopted a resolution declaring that expansion of IPS throughout Marion County would serve neither the economic interests of IPS nor the educational interests of its students. [1975 Wayne Ex. 00.]

Representative Ray Crowe testified that the objection to inclusion of IPS in Uni-Gov "was that the schools have been recently reorganized and the school systems prefer to be independent and carry on with their school systems as they were at that time." [1975 Tr. 51.] Charles Whistler, one of the drafters of Uni-Gov, testified to the same effect. [*Id.* at 57-58.] He further testified that inclusion of the schools in Uni-Gov might have impaired the value of their bonds. [*Id.* at 64.] It appears that factors usually considered important, such

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court parse burdens of proof.[13] No finding was made that appellants had failed to rebut what the court apparently found to be a prima facie case of discriminatory intent. As *Arlington Heights* makes plain, however, a finding of invidious purpose is rebuttable by a showing that the state action in question would have been taken in the absence of such purpose; the rejection of a county-wide school system a few years prior to the passage of Uni-Gov is powerful evidence that the same race-neutral reasons that dictated this prior decision would, even assuming a hypothetical discriminatory purpose in the exclusion of schools from Uni-Gov, have produced the same result a few years later.[14]

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as financing, local control, and administrative continuity, "strongly favored" the result reached in Uni-Gov, and not its opposite.

It should be noted also that any inclusion of schools in Uni-Gov would have presented very complicated problems. Among other things, the statutory inclusion would have had to deal with the method of selecting a governing body; the rights of teachers serving under different collective bargaining agreements with different pay scales; the degree of local control to be accorded to suburban schools, if any; and an equitable apportionment of existing assets and liabilities of the various school corporations.

13. The district court apparently was of the view, in fact, that discriminatory effects alone, if foreseeable, are sufficient to shift to the state the burden of proof on the issue of purpose. *Indianapolis V*, 456 F. Supp. at 189 (citing *Oliver* v. *Michigan State Bd. of Educ.*, 508 F. 2d 178, 182 (6th Cir. 1974)). As the Supreme Court has since made clear, this view is incorrect. *Dayton Bd. of Educ.* v. *Brinkman*, ..... U. S. ....., ..... n. 9, 99 S. Ct. 2971, 2978 n. 9 (1979).

14. *See Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 270, n. 21 (1977). As the majority observed in *Indianapolis IV*, 541 F. 2d at 1217,

> The Marion County Reorganization Committee, appointed pursuant to the [School Corporation Reorganization] Act [of 1959], initially recommended that all school systems in the county be merged into one, but the unanimous opposition of the suburban school districts defeated the merger proposal. There is no evidence that this opposition was racially motivated.

Ultimately, IPS, like the suburban districts, opposed consolidation. *See* note 12 *supra*. The following passage from the 1975 trial is also illuminating:

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But putting aside these fine points of equal protection analysis, even the finding of a "substantive departure" is clearly in error.

The district court found that the Indiana General Assembly passed Uni-Gov with discriminatory purpose because it "departed" from a "long established rule that the school city of Indianapolis should expand with the civil city" when it "repeal[ed] the crucial section of the 1961 Act" and "eliminat[ed] the schools from Uni-Gov."[15] The majority, in sustaining this

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> THE COURT: I don't know. The defendants will tell us in due time what these exhibits all mean, but I at this moment I rather infer that the purpose of the exhibits is to prove or tend to prove that the present division of Marion County into eleven separate school districts is something that happened because of reasons pertaining primarily to school finances as well as to the desire of non-IPS schools to maintain local autonomy rather than for reasons of separating students based on race. I presume that is the point of these exhibits.
>
> I presume that if the Government or the intervening plaintiffs had some evidence to the contrary that they would be cross-examining, or examining along those lines.
>
> Now I have said at one point in these proceedings that it may not make a difference what the motive was, the only question would be what was the result . . . .

[1975 Tr. 359-60.] The record contains nothing to indicate that the normal desire for local financing and control of the school districts, *see* note 12 *supra,* was not the prime reason for the failure of the county-wide school district proposal. Thus, the desire for autonomous local schools would, so far as the record reveals, have blocked any county-wide consolidation of the schools either in Uni-Gov or elsewhere. There is nothing sinister about this:

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.

*Milliken* v. *Bradley,* 418 U. S. 717, 741-42 (1974).

15. *Indianapolis V,* 456 F. Supp. at 188. The schools were never "eliminated" from Uni-Gov. As Mayor Lugar testified at trial, no draft of the proposed legislation ever included the schools. [1975 Tr. 164.]

The "crucial section" was § 9 of Indiana Acts 1961, Ch. 186. It provided, in pertinent part,

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finding, is more circumspect. It notes that this "crucial section," had it been left unrepealed, would have expanded IPS boundaries only "if" Uni-Gov "could be characterized as an extension of Indianapolis' civil city boundaries by civil annexation." *Ante* at 8. The majority appears to conclude that it can be so characterized. It seems to me plain that it cannot.

Under either the pre-1969 or the post-1969 civil annexation statute of Indiana,[16] civil annexation could be accomplished only by act of a city or town council. People who opposed annexation could file remonstrances. People who wished their property to be annexed could petition the council. No annexation could involve territory already a part of another city or town. The sole means for union of cities or towns was by a referendum in which citizens of the municipalities involved approved a proposed consolidation agreement reached by the councils. Union could be achieved only if all of the territory of both municipalities were to be joined.

In sharp contrast, Uni-Gov was the Act of the Indiana General Assembly. It was not the result of a petition, a referendum, or an act of a municipal council. It was not subject to remonstrances or to any of the other provisions of the civil annexa-

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> (a) Whenever the boundaries of any civil city are extended by a civil annexation which becomes effective as of a date subsequent to the effective date of this act, the boundaries of the school city which has jurisdiction over the area of such civil city or the major portion thereof shall be correspondingly extended by virtue of such civil annexation, subject only to the further provisions of this Section.

Section 9(b) gave a right of remonstrance to the losing school corporation. Further provisions of the Act are summarized in note 33 *infra*. Section 9 was repealed by Indiana Acts 1969, Ch. 52, § 2 (codified as Ind. Code § 20-3-14-11). This Act substituted a provision which allowed alteration of school boundaries only through a modified school annexation procedure.

16. Indiana Acts 1905, Ch. 129, §§ 241-244 (as amended by Indiana Acts 1955, Ch. 269) (repealed); Indiana Acts 1969, Ch. 239, §§ 301 & 401-414 (codified as Ind. Code §§ 18-5-10-8 & -19 to -32).

tion statutes;[17] indeed, it was the very need to get away from those unsatisfactory provisions that prompted the adoption of Uni-Gov.[18] To say that Uni-Gov, a complex reorganization of

17. For example, unlike the Indiana civil annexation procedure for effecting a union between two towns or cities, *see* Indiana Acts 1905, Ch. 129, § 241 (repealed); Indiana Acts 1969, Ch. 239, § 301 (codified as Ind. Code § 18-5-10-8), Uni-Gov provided for a limited merger of Indianapolis and other cities and towns in Marion County without a consolidation agreement or a referendum. *See* Indiana Acts 1969, Ch. 173, §§ 102(e) & 406 (codified as Ind. Code §§ 18-4-4-2 & -6). Similarly, the resulting consolidated city did not possess powers that were uniformly applicable to all territory within its borders; civil annexation or union of cities and towns could not have produced this result. *Compare* Indiana Acts of 1905, Ch. 129, §§ 241, 242a & 244 (repealed) *and* Indiana Acts 1969, Ch. 239, § 407(c) (codified as Ind. Code § 18-5-10-25(c)) *with, e.g.,* Indiana Acts 1969, Ch. 173, §§ 234, 314 & 406 (codified as Ind. Code §§ 18-4-2-34, -3-14 & -4-6).

18. Civil annexation as a means of expanding Indianapolis boundaries had proved unsatisfactory for two reasons. First, because unilateral annexation by Indianapolis could not affect the territory of adjacent cities and towns, Speedway, Beech Grove, and Lawrence blocked Indianapolis expansion on the west, southeast, and northeast. The fifteen other municipalities in Marion County were also immune to unilateral civil annexation. Second, the remonstrance procedure gave property owners and residents the right to effectively block annexations by tying them up in lengthy litigation. This right was employed against virtually every attempt by Indianapolis at unilateral annexation, because, as city planner Vogelgesang testified, residents "resisted annexation and felt the city could not provide them with services for the additional tax money that they would be paying." [1975 Tr. 220.] Thus, Mayor Lugar stated the reasons that led him to pursue the idea of Uni-Gov as follows:

> [A]nnexation as it was then part of our law was simply not going to make any difference, . . . in each of these cases we were successfully blocked and it did not occur to me circumstances in which annexation by the civil city could be successfully pursued in any large manner. So, as a result, I was intrigued by [the idea of Uni-Gov] . . . .

[1975 Tr. 174.] He further stated: "[T]he Uni-Gov concept was not a concept of annexation. It was essentially a concept of governmental reorganization which left the whole annexation question really totally to the side." [*Id.* at 166.] Thus Charles Whistler, one of a group of attorneys who drafted Uni-Gov, testified at trial that civil annexation statutes had no application to Uni-Gov. [1975 Tr. 64.] No different conclusion can result from the provision of Indiana

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Marion County municipal governments undertaken by the State of Indiana, might be characterized as a civil annexation ignores very basic legal distinctions.

Because Uni-Gov did not involve an annexation, the repeal of § 9 of the 1961 Act is irrelevant to this case.[19] Had the section remained in force it would not have expanded the

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Acts 1961, Ch. 186, § 1(e), which defined "civil annexation" as "any action" extending the boundaries of a civil city. The remainder of the 1961 Act makes plain that the annexation meant was that previously defined by statute. *E.g., id.* § 9(b): "Whenever . . . a civil city shall adopt an ordinance effecting such a civil annexation as is described in Section 9(a) of this Act, the losing school corporation shall have the right" to remonstrate under the provisions of Indiana Acts 1905, Ch. 129, § 243 (as amended), the then applicable civil annexation statute.

19. The majority attempts to draw an inference of discriminatory purpose from the fact that the repeal of § 9 passed as a "special bill, just sixteen days before final passage of the Uni-Gov legislation." *Ante* at 9. Even if § 9 had had any potential application to Uni-Gov, which it plainly did not, the time of passage of the repealer bill should not be considered in isolation from the history of the bill. The majority has overlooked the fact that the repeal was first proposed in 1967, and indeed was passed by both houses of the Indiana legislature in that year, but failed to become law because vetoed by the predecessor in office of the Governor who ultimately signed the repeal. The former Governor's 1967 veto message said that the bill might contain a possibility of partisan political mischief. As Mayor Lugar testified: "In '67 Uni-Gov was not being thought of." [1975 Tr. 180.] Moreover, as is demonstrated in note 18, *supra,* there were virtually no civil city annexations for IPS to follow for many years before 1969 because the difficulties described in note 18, *supra,* made them impracticable; this failure of the annexation mechanism was, as Mayor Lugar testified, the major reason for the passage of Uni-Gov. [1975 Tr. 160-61, 165-66, 168-70 & 174.] The failure of civil annexation was surely also a prime reason for the repeal of § 9 and other civil annexation provisions in 1969. All this, as well as the inapplicability to Uni-Gov of a statute dealing with civil annexation, *see* text *supra,* is ignored in the majority's conclusion, *ante* at 9, that "the repeal of section 9 of the 1961 Act appears to have been done in direct response to concerns that otherwise the boundaries of IPS would expand with the borders of the new City of Indianapolis." The record contains no evidence that such concerns existed and no basis for inferring their existence from other facts.

boundaries of IPS by an inch. Uni-Gov was totally beyond its terms.[20]

This crucial-section issue aside, all that remains of the "substantive-departure" finding is the related notion that Uni-Gov was a departure from a "long established rule" that IPS and Indianapolis would share a common boundary. This notion appears to stem from a belief that Indiana has had a policy favoring coterminous boundaries of city and school corporations. "Of greater relevance," the majority says, *ante* at 7, "is the history of school district expansion and consolidation in Indiana." It continues: "Indiana has for generations pursued a legislative

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20. Uni-Gov was beyond the terms of the 1961 Act, and thus unaffected by the 1969 repealer of § 9 of that Act, for yet another reason: Uni-Gov itself explicitly excluded schools from the reorganization plan, Indiana Acts 1969, Ch. 173, § 314 (codified as Ind. Code § 18-4-3-14); there was thus no need to attempt to exclude the schools by another enactment. Nor was the exclusion of schools from Uni-Gov remarkable. The Health and Hospital Corporation was excluded, as were the county offices of auditor, recorder, treasurer, sheriff, coroner, surveyor, clerk of the circuit court, and assessor. Police and fire protection were organized into "special service" districts which expanded beyond Indianapolis only in accordance with defined procedures; these districts apparently have expanded little since 1970. The "excluded cities" of Speedway, Beech Grove, Lawrence, and Southport retained control over aspects of local government such as police, fire, and sanitary services. The following agencies were also wholly or partly excluded: the airport authority and board; the county department of welfare and board; the county home board; the building authority, board of trustees and board of directors; the capital improvements board of managers; the housing authority; the library districts and boards; and "all other municipal corporations, boards, agencies and commissions" not expressly included in the Act. *Id; see also id.* § 404 (codified as Ind. Code § 18-4-4-4). The reason for these exclusions, Mayor Lugar testified, was to limit Uni-Gov and thereby insure the passage of its needed organizational improvements. Lugar said his attitude at the time was that "so long as a reasonable structure that allows for a county executive and county legislature and a bare boned situation . . . gives us some possibility to amend our future, I would be willing to settle for that." [1975 Tr. 165.] He further noted that many compromises in the areas of fire, police, and administrative agencies had to be worked out before the intricate process of negotiations produced the accommodation that was Uni-Gov. [*Id.*] *See also* note 12 *supra.*

policy that school district lines should grow as the corporate lines of their cities grow." With all due respect, I simply do not think the law of Indiana supports this view. Regard for the reader's patience, as well as a desire to speed this case on its way, limits me to a brief summary of the history of Indiana law on this point. [For an extensive treatment, see Metropolitan School Dist. of Perry Township Br. in Nos. 75-1730 through 75-1737 & 75-1765, pp. 13-32.]

The organization of schools in Indiana has gone through three basic phases. In the first phase, schools were organized by congressional township. The Territory, and later State, of Indiana were divided into townships of thirty-six square miles each; a thirty-sixth part of each township was reserved for the support of public schools. From a 1785 ordinance of the Continental Congress, through Indiana's first constitution in 1816, to a series of laws culminating in 1843, the method of organizing and supporting schools by township land grant was preserved.[21] During this time, school districts were "laid off in such manner as shall be most convenient for the population and neighborhoods."[22] School trustees could, "if convenience require[d] it," form districts "out of parts of each township," and a majority of the voters of a district could, by petition, alter the district boundaries "as convenience may require."[23]

The second phase began with the adoption of a new Indiana Constitution in 1851.[24] Under statutes passed pursuant to the

21. *Ind. Const.* art. IX, § 1 (1816) (superseded); Indiana Acts 1818, Ch. 49; Indiana Revised Laws 1824, Ch. 97; Indiana Revised Laws 1831, Ch. 86; Indiana Revised Statutes 1838, Ch. 94; Indiana Revised Statutes 1843, Ch. 15; H. Hawkins, *Indiana's Road to Statehood, A Documentary Record* 9-16 & 60-67 (Indiana Sesquicentennial Commission 1964).

22. Indiana Revised Statutes 1843, Ch. 15, § 32.

23. *Id.* at §§ 35 & 38.

24. *Ind. Const.* art. 8, § 1 (1851).

new constitution,[25] the state took over the burden of financing the schools, and it reorganized them with the civil city or town as a basic geographical unit. Coterminous city and school boundaries were often the result.

The advent of the third phase was gradual. Some cities failed to reorganize the schools under the new laws, and these omissions were legalized by the legislature in 1897.[26] In 1899, cities that had reorganized their schools were permitted to revert to the township format, again by act of the legislature.[27] In 1901, cities were permitted to consolidate their schools with those of other school corporations in the same township.[28] Acts in the early part of this century permitted jointly run schools and consolidation of school corporations.[29] By mid-century, the third phase of Indiana school organization was well under way.

The new phase was ushered in by the need to increase the revenue base for the many small city school corporations. In 1947 and 1949, the Indiana General Assembly adopted statutes allowing the creation of school corporations without respect to city, town, township, or country boundaries.[30] By 1959 the Supreme Court of Indiana was to say:

> [T]he legislature has found it necessary to enlarge the tax base supporting the local school unit. This has necessitated

25. Indiana Revised Statutes 1852, Ch. 98; Indiana Acts 1855, Ch. 86; Indiana Acts 1859, Ch. 119, § 1 (codified as Ind. Code 1971, § 20-2-8-1); Indiana Acts 1861, Ch. 41, § 4; Indiana Acts 1865, Ch. 1, § 4 (repealed by Indiana Acts 1972, P. L. No. 170, § 1).

26. Indiana Acts 1897, Ch. 72, § 1.

27. Indiana Acts 1899, Ch. 160.

28. Indiana Acts 1901, Ch. 200.

29. Indiana Acts 1911, Chs. 187 & 193; Indiana Acts 1915, Ch. 141; Indiana Acts 1917, Ch. 19, 23 & 148; Indiana Acts 1919, Chs. 151, 216 & 229; Indiana Acts 1921, Ch. 268; Indiana Acts 1925, Ch. 134; Indiana Acts 1927, Chs. 58, 111 & 225; Indiana Acts 1937, Ch. 154.

30. Indiana Acts 1947, Ch. 123 (codified as Ind. Code 1971, § 20-4-5) (as amended); Indiana Acts 1949, Ch. 226 (codified as Ind. Code 1971, § 20-4-8) (as amended).

> getting away from the identification of school district boundaries with the boundaries of civil units, and the many attempts of the General Assembly to deal with school consolidation in the past 40 years are but expressions of the legislative intent in this direction.

*Fort Wayne Community Schools* v. *State*, 240 Ind. 57, 64, 159 N. E. 2d 708, 711 (1959). In 1959 also, the legislature passed the School Corporation Reorganization Act[31] to accomplish that end.

Thus the policy from which Uni-Gov is said to be a substantive departure was first pursued for fiscal and administrative reasons, was abandoned when those reasons no longer supported it, and had not existed in Indiana for many years prior to the passage of Uni-Gov.[32] The only real policy that can be inferred

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31. Indiana Acts 1959, Ch. 202 (codified as Ind. Code 1971, § 20-4-1). The statute disregarded municipal, county, and township boundaries in its pursuit of "an efficient and economical reorganization plan best suited to local conditions." *Id.* § 1 (Ind. Code 1971, § 20-4-1-1). Under this statute, the present boundaries of school corporations in Marion County were set. I do not understand appellees to contend that there was anything unconstitutional about the process that fixed these boundries. It is also noteworthy that the school reorganizations accomplished pursuant to the 1959 Act resulted in school boundaries not coterminous with other units of government in 70% of the school corporations in Indiana. *Indianapolis IV*, 541 F. 2d at 1217.

32. The majority observes, *ante* at 8, that, "although there was seldom a perfect correspondence between civil city and school boundaries, the exceptions were generally in favor of larger, rather than smaller, school districts." This appears to be a reference to the 1959 School Corporation Reorganization Act, which, as noted above, disregarded civil unit boundaries to achieve school corporations with a larger tax base. It seems to me possible, however, that the majority means by this comment to indicate that the failure to expand IPS boundaries was somehow inconsistent with a subsidiary "policy" favoring the larger over the small school corporation. As is plain, however, IPS had no need to expand to improve its tax base: IPS was, and apparently still is, the most fiscally secure school corporation in Marion County. Moreover, IPS is now the 29th largest school corporation in the nation, and Marion County contains no school corporation below the median size of Indiana's 305 school corporations. As there was no need after 1959 to enlarge the tax base of

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from the foregoing history of school district boundaries in Indiana is that district lines should be drawn on a financially sound, efficient, and locally acceptable basis.

The 1961 Act so much debated in this litigation, § 9 of which is shown above to have been inapplicable to Uni-Gov because triggered only by civil annexation, is not inconsistent with the policy just described. Indeed, as the provisions summarized in the margin demonstrate, that Act is expressive of this policy and not of an obsession that school district and municipal boundaries must match, come what may.[33]

Given the absence of a substantive departure and the irrelevance of the repeal of § 9 of the 1961 Act, the court is left where it started: The legislature omitted schools from Uni-Gov, but there is no evidence that race was a reason for doing so. The real question then is whether the Indiana General Assembly had an obligation to include schools in the reorganization effort and

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any of the Marion County school corporations, there was also no need to expand IPS boundaries to the county line.

The majority also appears to believe that the "policy" favoring coterminous boundaries was enforced "particularly in Marion County." *Ante* at 10. I have, I hope, sufficiently demonstrated the absence of such a policy either in Marion County or elsewhere in Indiana. Moreover, neither the record nor the majority opinion suggests any rationale that could conceivably underlie a policy of coterminous boundaries with respect to only one county in Indiana.

33. The 1961 Act contemplated, by its very terms, that coterminous boundaries were not an inviolate policy. It speaks of school districts and cities that occupy "all or the major part in area" of one another. Indiana Acts 1961, Ch. 186, § 1(b) & (c); *see also* note 15 *supra*. Moreover, it allowed two school corporations to transfer territory between them by agreement regardless of civil boundaries, § 3; allowed IPS, as well as the School Cities of Speedway and Beech Grove, a conditional power of unilateral annexation of territory from an adjoining school corporation, § 4; and provided, in the case of a civil annexation, for agreement between the losing and the gaining school corporations to disregard for school purposes all or part of the alteration brought about by the civil annexation, § 9(c). Indeed, actions taken pursuant to the 1961 Act did in fact cause the separation of IPS and Indianapolis boundaries. [Lawrence Br. at 21-22, and portions of the record cited therein.]

thereby further remedial steps toward integration. As I understand *Milliken* v. *Bradley*, 418 U. S. 717 (1974), such an obligation did not exist in the absence of an interdistrict violation.

*Actions of the Housing Authority*

To find discriminatory purpose in the Housing Authority's location of public housing within the City of Indianapolis is to ignore reality and the record in this case. In the first place, the record shows that the Housing Authority played a relatively small role in the selection of public housing sites. Two methods were used to select the sites. The first was the "turn-key" method.[34] As was testified at trial, by this method a private developer could "select sites and option the ground and subsequently turn the project over to the Housing Authority," after having built the units "consistent with specifications." [1975 Tr. 257, 289.] A majority of the sites on which the projects were eventually built were selected by this method, which had the virtue of producing public housing faster than did site selection by government agency. [*Id.* at 89, 289, 314-15.]

The remaining sites that were eventually used by the Housing Authority were found by a mayoral task force working in conjunction with the Metropolitan Planning Commission. [*Id.* at 240-41.] The task force produced a map of potential housing sites "both inside and outside the city limit," and then recommended certain of these sites "to the administration in the Public Housing Authority as potential public housing sites." [*Id.* at 240.] The task force also approved sites that private developers had optioned under the turn-key method. [*Id.* at 257.]

From the foregoing it is apparent that the role of the Housing Authority in site selection was limited; the Authority apparently chose from among the sites tendered to it by the task force. Nothing in the record indicates how this choice was made, and there is no evidence concerning whether the Authority ever

34. Concerning the turn-key method, see 24 C. F. R. § 841.201 *et seq.* (1979).

undertook any independent search for project sites. This alone undercuts the conclusion that plaintiffs proved discriminatory purpose on the part of the Housing Authority. If more were needed, it is clear from the record that the absence of sites outside of Indianapolis was due not to discriminatory purpose, but to neutral requirements of Indiana and federal law.

First, as we previously have acknowledged,[35] and as the majority does not now appear to dispute, the Housing Authority could obtain the necessary federal funds to finance its projects[36] only if it had obtained a cooperation agreement with "the governing body of the locality involved."[37] Under federal law, a cooperation agreement requires a governing body to provide services and to waive taxes on the project.[38] Second, the Housing

35. *Indianapolis IV*, 541 F. 2d at 1216.

36. The Housing Authority depends on federal contributions and federal guarantees of its bonds. Neither Indiana nor any state agency underwrites the Authority's financing. Ind. Code § 18-7-11-14.

37. The applicable provision at the time was 42 U. S. C. § 1415 (7)(b)(i); 42 U. S. C. § 1437c(e) (1976) is the recodification of that provision and is identical in all relevant respects. It provides, in pertinent part—

> In recognition that there should be local determination of the need for low-income housing to meet needs not being adequately met by private enterprise—
>
> (1) . . . .
>
> (2) the Secretary shall not make any contract for loans . . . or for annual contributions pursuant to this chapter unless the governing body of the locality involved has entered into an agreement with the public housing agency providing for the local cooperation required by the Secretary pursuant to this chapter.

38. Although a cooperation agreement requires the governing body to agree to waive real and personal property taxes on the project, the governing body can receive, in lieu thereof, up to ten percent of the rental income. 42 U. S. C. § 1437d(d) (1976); *see also Mahaley* v. *Cuyahoga Metrop. Housing Auth.*, 335 F. Supp. 1245, 1248 (N. D. Ohio 1973). Besides the waiver of taxes, HUD regulations current in 1966 required that cooperation agreements contain a promise by the governing body to eliminate "unsafe and insanitary dwelling units" and to supply "public services," as well as

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Authority's jurisdiction under Indiana law during the time in question extended to Indianapolis and any area within five miles of the boundary of Indianapolis, but not to any territory within any other city.[39] Finally, any power the Authority may have had to build projects in the unincorporated suburbs was effectively nullified by the fact that it had no cooperation agree-

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"other forms of cooperation" to the projects. 24 C. F. R. § 1520.1(f) & .3 (1966). Deputy Mayor Carroll so testified at trial. [1975 Tr. 256.] *See also James* v. *Valtierra,* 402 U. S. 137, 143 n. 4 (1972):

> [T]he local government body must agree to provide all municipal services for the units and to waive all taxes on the property. The local services to be provided include schools, police, and fire protection, sewers, streets, drains, and lighting.

The applicable regulations today are no different in this regard. 24 C. F. R. § 841.102(c) & .110(b) (1979); *cf. id.* § 200.710; *see also* notes 44 & 45 *infra.* Thus, without a cooperation agreement promising both a waiver of taxes and the provision of essential services, HUD would not finance the project and, as a consequence, *see* note 36 *supra,* the Housing Authority could not build it.

39. Indiana Acts 1937, Ch. 207, § 3(g). This provision was amended by Indiana Acts 1969, Ch. 291, § 3(g) (codified as Ind. Code § 18-7-11-3(g)), to provide that the Housing Authority had jurisdiction to build in a "city or town" within five miles of Indianapolis only if the city or town "consent[ed] thereto by resolution of its governing body."

Whether or not the Housing Authority had jurisdiction, prior to 1969, to build in "towns," as distinguished from "cities," within five miles of the boundary of Indianapolis, federal law would have required the governing body of the town in question to enter into a cooperation agreement with the Authority, *see* note 37 *supra.* I know of nothing in the record to indicate whether any such agreement with a town was ever sought or denied. The record is also vague on which towns, other than perhaps the Town of Speedway, might have been within the Authority's pre-1969 jurisdiction, and whether any suitable sites existed in any such town during the time in question. The reason for this is that the plaintiffs have never pursued the theory that the failure to build in "towns" as opposed to "cities" or unincorporated areas of Marion County was the essence of the Housing Authority's allegedly wrongful conduct. Even assuming plaintiffs have preserved this precise issue, they have clearly failed to meet their burden of proving that the failure to locate projects in "towns" within five miles of Indianapolis was prompted by discriminatory purpose.

ment with the "governing body" of those areas, which consisted of the Marion County Council and its executive arm, the Board of County Commissioners.[40]

The majority appears to approve a finding of invidious purpose because "[t]he evidence at trial . . . disclosed no serious attempt to obtain . . . cooperation agreements,"[41] and because "the evidence at trial showed that HACI never considered placing traditional public housing outside the old city limits." *Ante* at 16. Apart from the vagueness of the phrases serious attempts and traditional public housing,[42] this view seems to me

40. There is no question that, as to location of housing projects in the unincorporated areas of Marion County, the Board of County Commissioners and the Marion County Council together constituted the "governing body" involved. They were the body that would be required by federal law, *see* notes 37 & 38 *supra* to sign a cooperation agreement and promise to provide essential services before federally funded housing could be located in their jurisdiction. *See* 24 C. F. R. § 1520.1(e) & .3 (1966); Ind. Code § 18-7-12-2.

The majority notes, *ante* at 15, that "[o]ne project was built just across the street from Warren township (then 98% white). Another [the Eagle Creek project] was located on land that was once a part of Wayne township (then 99% white), but was annexed by the old city, at HACI's request." Aside from the fact that the integrative impact of the location of these projects scarcely evinces a segregative purpose, *see* note 45 *infra*, the inference of discriminatory purpose the majority would draw from these sitings is entirely undercut by the fact that the Housing Authority had no cooperation agreement with the governing body of either Warren or Wayne township; the Authority thus could not locate projects in these townships. This fact explains both the sitings and the annexation of one of the sites to Indianapolis.

41. In the majority opinion in *Indianapolis IV*, the fact that an effort was made to obtain cooperation agreements was recognized. 541 F. 2d at 1216.

42. I understand the reference to "traditional" public housing to mean housing developed by the Housing Authority and financed by Hud under the terms of the United States Housing Act of 1937, 42 U. S. C. § 1437 *et seq.* (formerly codified at 42 U. S. C. § 1401 *et seq.*) (as amended). Ten such projects were built in Indianapolis in the 1960's. The record contains many references to other types of housing, some of it built in the suburbs, and some of it apparently under the control of the Housing Authority. [*E.g.*, 1975 Tr. 72, 76.] The location of these other types of housing is not alleged to have been discriminatory.

to have a number of problems. First, as I have earlier observed, the evidence at trial does not indicate whether or not the Housing Authority acted independently of the task force in seeking sites outside Indianapolis. The task force considered suburban sites and reported to the Housing Authority,[43] and for all the record reveals, the Authority may also have investigated suburban sites. Second, the majority's view places the burden of proof on the issue of discriminatory purpose on the wrong party. Even assuming that the Housing Authority failed to demonstrate a "serious" attempt to affirmatively facilitate school desegregation by placing projects in the suburbs, that fact scarcely suffices to carry plaintiffs' burden on the issue of discriminatory purpose. *See Village of Arlington Heights* v. *Metropolitan Housing Development Corp., supra,* 429 U. S. at 270 & n. 21; *Washington* v. *Davis, supra,* 426 U. S. at 241. Finally, the record reveals that the task force that selected sites for the Housing Authority approached the County Council and County Commissioners about the possibility of placing projects in their jurisdiction. The response was negative; the reason given was that the County could not provide for the projects the municipal services then required under federal law.[44] I assume the Housing Authority

43. Testimony at trial established that the task force, while acting on behalf of the Housing Authority, determined that sites outside of Indianapolis were not suitable both because of an absence of a cooperation agreement with the county government and because of an inability to secure from that body either a cooperation agreement or the municipal services that the agreement would have required the county to provide. [1975 Tr. 241, 251, 259-60, 263-64.] *See* note 44 *infra,* and accompanying text. To say that the task force determined that suburban sites were not feasible is not to say, however, that suburban sites were not considered.

44. Deputy Mayor Carroll, who served on the staff of the task force, testified:

> At that time we were attempting to select the locations for the Housing Authority sites, the county government, which was current before Uni-Gov at that time, operated by the County Council, County Commissioners, indicated in the process of early discussions with the committee that they were unable to provide the kinds of services that were required for public housing location at that time.

[1975 Tr. 272; *see id.* at 259-60, 263.]

(Footnote continued on next page.)

was not required by the Fourteenth Amendment to engage in a futile repetition of the request. There is no evidence that the county government denied the request for invidious reasons.

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(Footnote continued from preceding page.)

An idea of the type of services that the County Council and County Commissioners were being asked to provide, *see* note 38 *supra,* can be gleaned from the following:

September 1965 HUD Guidelines on Site Selection required that sites be "well related to public transportation, public schools, shopping" and all other essential services; they further required that consideration be given to the proximity of playgrounds, off-street parking, and the availability of sewer services. *Id.* § 205.1(3) & (4).

City planner Vogelgesang testified at trial that the search for project sites in the suburbs was virtually precluded by a combination of jurisdictional and HUD guideline requirements. [1975 Tr. 241, 251.] Deputy Mayor Carroll testified that the task force's site selection criteria included the availability of water, sewer, utility, police, fire, public transportation, school, park, shopping and other basic community services; that access to places of employment was considered; and that many of these criteria were incorporated into the then current HUD guidelines. [*Id.* at 255-56.] Carroll further testified that a "substantial concentration" of services was required for public housing projects, that "[t]hese did not exist in the unincorporated areas of the county," and that the public transportation and low cost health, legal, and welfare services that were necessary to the tenants of housing projects were not available in the suburbs. [*Id.* at 262-64, 279-83.] John Mullin, Assistant Director of the Housing Authority, testified that many public housing tenants do not own automobiles and that that fact makes access to public transportation essential for a public housing site. [*Id.* at 85.] Public transportation was not available in the suburbs at the time in question. [*Id.* at 270-71.] Seven years later, at the time of trial, many potential suburban sites were still without public transportation. [*Id.* at 262.] Yet the county government was being asked to provide public transportation, as well as other services, before projects located in its jurisdiction could open.

HUD regulations currently require that sites be served by utilities such as water, gas, and electricity, and that they have adequate sewer and street service. 24 C. F. R. § 841.107(b) (1979); *see id.* § 200.710. HUD's criteria for site approval includes, among other things, the presence of recreational, social, educational, commercial, and health services; the absence of flooding, air pollution, excessive noise, sewage hazards, septic tank backups, mudslides, smoke or dust, vibration, vehicular traffic, rodent or vermin infestation, and fire hazards; the cost and time involved to travel to places of employment "providing a range of jobs for low(er) income workers"; and general consistency with environmental, developmental, and social goals for the area in question. *Id.*; *see also* note 45 *infra.*

Thus, even if a violation might be predicated on that theory, *cf. James* v. *Valtierra,* 402 U. S. 137 (1971), there is no proof to support the theory.

As a practical matter, the Housing Authority had power to locate projects only within the City of Indianapolis. Such power as it had was exercised to promote integration, not segregation. The projects, most of whose occupants would be black, were located in what were at the time primarily white areas.[45] It is ironic that these sitings have now subjected the Housing Authority to a finding of invidious purpose.

If I am right in my belief that the record does not support the findings of discriminatory purpose,[46] the real issue raised by this

45. Testimony during the 1975 trial showed that in 1968 about thirty percent of the residents of projects were white, and that a majority of the ten projects were in nearly all-white neighborhoods when they were built. [1975 Tr. 82 & 93-94.] For example, the Eagle Creek project that was located on land annexed from Wayne township and was earlier mentioned in another regard, *see* note 40 *supra,* was located in an area 99.3% white in 1960 and 91.7% white in 1970. Moreover, HUD approval of projects has, at least since 1972, been in part contingent upon their being located in a fashion that will promote integration. 24 C. F. R. § 200.710 (1979). HUD approved the project sites on which the Housing Authority built, and even if integrative impact was not an explicit criterion at the time HUD gave its approval, it is difficult to believe that HUD would have approved locations that were selected to promote segregation. In addition, Housing Authority Assistant Director Mullin testified at trial that the Authority had attempted to maintain a racial balance within the projects themselves, but that HUD regulations requiring applications to be granted without regard to race had made it impossible to maintain a racial balance. [1975 Tr. 79, 82-83; *see id.* at 94.] Indeed, the United States, though it takes a contrary view now, suggested in 1971 that the district court find that the "locations of six of the ten projects . . . have tended to promote integration." *Indianapolis I,* 332 F. Supp. 674 n. 81. The majority notes *ante* at 15 n. 17, that the trial court determined that the evidence was insufficient to support a finding of integrative effect. This determination was made before the evidence just chronicled had been heard. Moreover, it appears obvious that the location of the projects did produce integration in housing. The location did not, apparently, further school desegregation; but the Housing Authority's business was housing, not schools.

46. Because of my view that discriminatory purpose has not been demonstrated, I do not consider here the difficult remedial problems that I believe are posed by this case.

case is whether otherwise permissible state action that does not attempt to remedy the effect of *de facto* segregation is for that reason alone an act of *de jure* segregation. The lesson to be derived from today's decision seems to be that the answer is yes, and that a state's attempt to solve a governmental or social problem will be constitutionally permissible only if the state adopts the solution that will maximize desegregation of schools that are *de facto* segregated. Indiana, had it chosen to leave Marion County's civil government in its chaotic state, instead of adopting Uni-Gov, would have had no affirmative obligation to reorganize the schools or to transfer students across district lines.[47] Similarly, had Indiana failed to provide a Housing Authority, or had it confined the Authority's jurisdiction to Indianapolis, the Constitution would not have been violated. Instead, Indiana acted to improve municipal government and to provide decent housing for persons of limited means in a manner that would promote integration in housing. Because Indiana did not include in its governmental-structure and housing reforms a program of affirmative action with respect to *de facto* school segregation, which it included would have made the reforms themselves impossible to carry out,[48] Indiana has been found to have intended a school segregation it did not create.

Thus a state may not restructure civil government or build public housing in an area in which *de facto* school segregation exists without assuming also the affirmative duty to remedy that segregation. The failure of the state action to include a remedy for school segregation will be enough to establish discriminatory purpose, for if the additional circumstantial indicia in this case can tip the scales toward a finding of invidious purpose, it is hard

47. This is clear from *Milliken* v. *Bradley, supra,* and from our outright reversal in *Indianapolis II,* 503 F. 2d 68, of the interdistrict remedy as to school districts outside Marion County.

48. As the majority acknowledges, Uni-Gov would not have passed had the schools been included. *Ante* at 9. As the record makes plain, the absence of necessary services and cooperation agreements precluded the location of housing projects in the suburbs.

to imagine a case in which sufficient additional indicia would be lacking. The result of such a rule may be to force the elimination of some *de facto* segregation. Democratic processes being what they are, however, the result may also be the abandonment of efforts to provide needed governmental reforms and services. But whatever the result, today's decision cannot, I think, be reconciled with the distinction between *de jure* and *de facto* segregation as it has been recognized by the Supreme Court.[49]

With all respect for my colleagues, both here and on the district court, I can find no basis in the present record for expanding the remedy in this case beyond the system in which the violation occurred. I would therefore reverse the judgment and remand with the direction to proceed at once toward implementation of an intradistrict remedy.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

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49. *But cf. Columbus Bd. of Educ.* v. *Penick*, ..... U. S. ....., ....., 99 S. Ct. 2941, 2971 (1979) (Rehnquist, J., dissenting); *Dayton Bd. of Educ.* v. *Brinkman*, ..... U. S. ....., ....., 99 S. Ct. 2971, 2981 (1979) (Rehnquist, J., dissenting); *id.* at 2988-93 (Powell, J., dissenting).

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

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Nos. 75-1730 through 75-1737, 75-1765, 75-1936, 75-1965, and 75-2007

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

and

DONNY BRURELL BUCKLEY, et al.,

*Intervening Plaintiffs-Appellees,*

*v.*

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al.,

*Defendants-Appellants.*

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On Remand from the Supreme Court of the United States.

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FEBRUARY 14, 1978

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Before FAIRCHILD, *Chief Judge,* SWYGERT and TONE, *Circuit Judges.*

SWYGERT, *Circuit Judge.* Our decision today is a continuation of protracted litigation which began in 1968 over whether and to what extent the public schools of Indianapolis must be desegregated. In our most recent opinion, we affirmed the district court's order calling for the busing of black students from within the Indianapolis Public School District ("IPS") to

schools which are outside IPS but within Marion County ("Uni-Gov"). *United States* v. *Board of School Commissioners,* 541 F. 2d 1211 (7th Cir. 1976). The Supreme Court vacated our judgment and remanded the case to this court for further consideration in light of *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U. S. 252 (1977), and *Washington* v. *Davis,* 426 U. S. 229 (1976), which require proof of racially discriminatory intent or purpose to show a violation of the Equal Protection Clause. *See* 429 U. S. 1068 (1977). For the reasons and in the areas set forth below, we now remand this case to the district court for further findings of fact.

## I

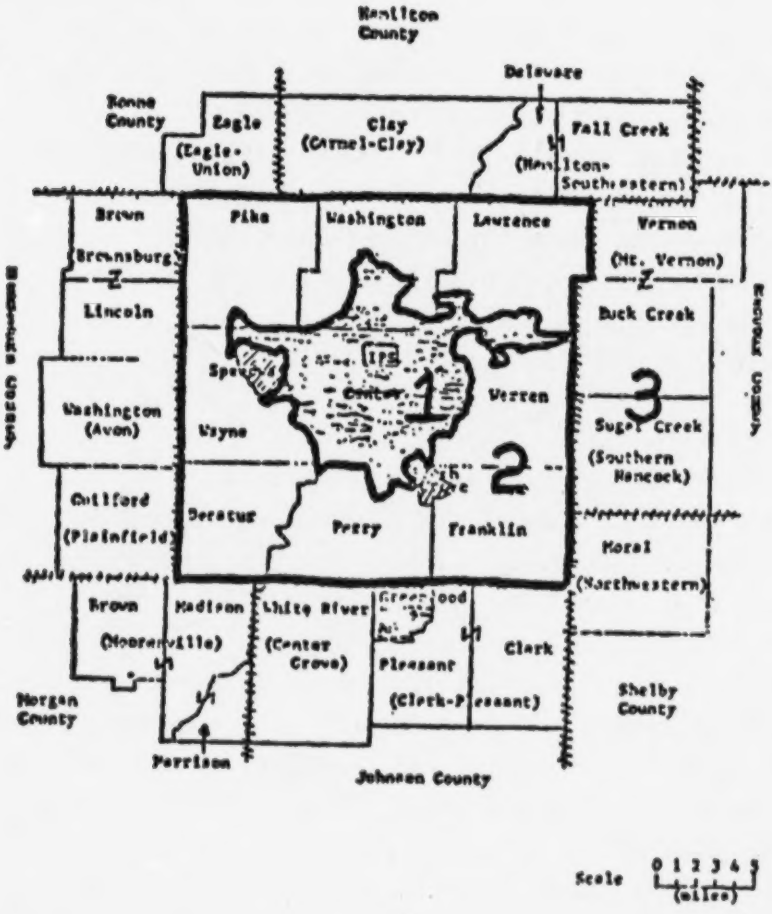
Because of the age of this suit, its sheer size, the number of parties which have intervened or have been added during the course of the proceedings, and the fact that this case has made several trips through the appellate process,[1] we think it would help to summarize the present posture of this case, namely, to identify those issues which have been settled and those which remain unresolved. Before proceeding to do so, however, it is important to understand the three geographical areas which have at some point been the subject of this litigation. As illustrated by the diagram below, those three areas include: (1) IPS, whose boundaries are coterminous with the City of Indianapolis (before Uni-Gov), (2) suburban school districts within Marion County and, since the enactment of the Uni-Gov Act in 1969, within the boundaries of the City of Indianapolis (after Uni-Gov),[2] and

1. The history of this litigation was described in our most recent opinion. *See* 541 F. 2d 1211, 1212-15 (7th Cir. 1976), *vacated and remanded,* 429 U. S. 1068 (1977).

2. Under the Uni-Gov Act, Ind. Code §§ 18-4-1-1 *et seq.,* the boundaries of the City of Indianapolis were expanded to and became coextensive with the boundaries of Marion County. The new consolidated city is now called the City of Indianapolis. Ind. Code § 18-4-1-4. This new city includes all territory within Marion County except for the cities of Beech Grove, Lawrence, and Speed-

(Footnote continued on next page.)

(3) school districts which are outside of and adjacent to Marion County.




On August 18, 1971, the district court found that the Indianapolis School Board was deliberately operating a *de jure* dual system on May 17, 1954 (date of *Brown I*), and had not changed its policies since that year in order to eliminate that

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way ("excluded cities") which are permitted to carry on as separate municipal corporations. Ind. Code § 18-4-1-2. Cities in these excluded territories may still vote in mayoral and city-county council elections, however, and they receive certain benefits from the consolidated City of Indianapolis. *See Dortch* v. *Lugar*, 225 Ind. 545, 266 N. E. 2d 25, 35-37 (1971).

*de jure* segregation. *United States* v. *Board of School Commissioners*, 332 F. Supp. 655 (S. D. Ind. 1971). In affirming, this court said, "[I]t is clear that the district court found a purposeful pattern of racial discrimination based on the aggregate of many decisions of the Board and its agents." 474 F. 2d 81, 84 (7th Cir.), *cert. denied*, 413 U. S. 920 (1973). After reviewing the district court's findings regarding the gerrymandering of school attendance zones, the segregation of faculty, the use of optional attendance zones among the schools, and the pattern of school construction and placement, we held: "[T]he evidence of both segregatory intent and causation is substantial enough to support the district court's findings." *Id.* at 85.

On remand, the district court determined that state officials are ultimately charged under Indiana law with the responsibility of operating the public schools. The court further determined that these officials had caused and promoted segregation within IPS, so that the State had an affirmative duty to assist the IPS Board in desegregating its schools. 368 F. Supp. 1191 (S. D. Ind. 1973). We affirmed this holding on appeal. 503 F. 2d 68, 80 (7th Cir. 1974), *cert. denied*. 421 U. S. 929 (1975). These rulings, finding both the Board and the State guilty of *de jure* segregation within IPS, now constitute the law of this case.[3] Accordingly, the parties and the courts are precluded from reexamining them. Desegregation remedies within the confines of IPS are therefore wholly appropriate.

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3. The doctrine of the law of the case has been explained by the Supreme Court as follows:

> When matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court. Thus a cause proceeds to a final determination. While power rests in a federal court that passes an order or decision to change its position on subsequent review in the same cause, orderly judicial action, except in unusual circumstances, requires it to refuse to permit the relitigation of matters or issues previously determined on a former review. *Insurance Group Committee* v. *Denver & Rio Grande R. R.*, 329 U. S. 607, 612 (1947).

The district court when fashioning a remedy was understandably concerned with the problem of "white flight." The court was opposed to a desegregation plan limited solely to IPS because evidence showed that such a plan would accelerate the white exodus with the resultant effect of resegregating the Indianapolis schools. The only feasible permanent desegregation plan, in the district court's view, was to order an interdistrict remedy which encompassed the entire metropolitan area, including the suburban districts within Marion County and the adjacent districts outside of the county (areas 2 and 3 in the diagram above). 368 F. Supp. 1191 (S. D. Ind. 1973).

This court, under *Milliken* v. *Bradley*, 418 U. S. 717 (1974), reversed the district court's order pertaining to the interdistrict remedy as to those school districts outside Marion County (area 3). 503 F. 2d 68, 86 (7th Cir. 1974), *cert. denied*, 421 U. S. 929 (1975). This holding, as the one inculpating the State and the school board within IPS, is subject to the law of the case principle and therefore is closed to further examination.

The only issue before us, then, is whether the district court in the exercise of its equity jurisdiction may impose an interdistrict remedy which includes the transfer of students from IPS to the suburban districts within Marion County. Resolution of this issue necessarily presupposes an affirmative answer to each of the following subsumed questions: (1) whether at least one of the predicates for metropolitan relief as enunciated in *Milliken* v. *Bradley*, is present, and (2) whether the relevant acts or omissions of state or local officials were motivated, at least in part, by a racially discriminatory purpose or intent as articulated in *Washington* v. *Davis* and *Arlington Heights*.

As will become more apparent below, resolution of these two preliminary questions requires remanding this case to the district court. On remand, the task of the district court is to make further findings of fact from evidence already in the record or, if necessary, as supplemented by additional evidence.

## II

Any decision as to whether interdistrict school desegregation remedies may be imposed must begin with a consideration of the principles enunciated by the Supreme Court in *Milliken* v. *Bradley*, 418 U. S. 717 (1974). The Court in reversing the proposed interdistrict remedy in that case did not foreclose all metropolitan desegregation plans. As said in *Hills* v. *Gautreaux*, 425 U. S. 284, 298 (1976):

> Nothing in the *Milliken* decision suggests a per se rule that federal courts lack authority to order parties found to have violated the Constitution to undertake remedial efforts beyond the municipal boundaries of the city where the violation occurred.

The underlying principle controlling the question of whether an interdistrict remedy is appropriate is that "the scope of the remedy is determined by the nature and extent of the constitutional violation." 418 U. S. at 744. Interdistrict relief was found impermissible in *Milliken* because there was no evidence that either the State or any of the suburban school districts had engaged in unconstitutional activity which had a cross-district effect. *Id.* at 748. The interdistrict decree was therefore impermissible because it was not commensurate with the constitutional violation to be repaired. *See Gautreaux*, 425 U. S. at 294.

Before a court may impose an interdistrict remedy, a constitutional violation, *i.e.*, intentional state action, must exist which has significant segregative interdistrict effects.[4] *Milliken*, 418 U. S. at 744-45; *Gautreaux*, 425 U. S. at 294-96. The Court in *Milliken* gave several examples of violations having an interdistrict effect, including actual district line crossings by students, deliberate drawing of district lines on the basis of race, and state

4. The place where the constitutional violation occurred is irrelevant for imposing interdistrict relief. It makes no difference whether the violation is inter- or intra-district. The crucial question is rather whether the violation caused or created a cross-district or interdistrict effect.

actions that affect residential patterns by influencing the location of families with school children. 418 U. S. at 745; 418 U. S. at 755 (Stewart, J. concurring).

The district court in the instant case found two violations upon which it based the proposed inter-district remedies. *See* 419 F. Supp. 180 (S. D. Ind. 1975). The first was the failure of the State to extend the boundaries of IPS when the municipal government of Indianapolis and the other governmental units in Marion County were replaced by a consolidated county-wide government called "Uni-Gov." The second violation was the segregative housing practices by the State and its agents, such as the confinement of all public housing projects (in which 98% of the residents were black) to areas within the boundaries of the "old" City of Indianapolis. We must address each of these areas to determine whether they can form the basis for imposing interdistrict remedies under *Milliken*.

A

Whether the reestablishment of boundaries of the City of Indianapolis without the like reestablishment of IPS boundaries can form a basis for imposition of an interdistrict remedy within the "enlarged" City of Indianapolis requires a finding of intentional state action which causes a significant segregative interdistrict effect. To understand whether the Uni-Gov Act and its companion legislation meets the standards of *Milliken* requires a brief review of the history of school district boundaries in Indiana.

At Indiana common law, the boundaries of a school district and of a civil city were coterminous; when a city expanded its corporate limits, the school boundaries expanded correspondingly.[5] This rule was codified as to IPS by a 1931 Act which provided that the boundaries of IPS were to be coterminous

5. *See* cases cited in 332 F. Supp. 655, 675 n. 86 (S. D. Ind. 1971).

with those of the City.[6] In 1959 the Indiana General Assembly enacted the School Reorganization Act[7] which had the effect or reducing the number of school districts outside Marion County from 990 to 305. 541 F. 2d at 1217. The reorganized districts, however, were not tied to the boundaries of civil government and indeed some of the consolidated school districts even crossed county lines.[8] Once the school districts were consolidated, their boundaries were frozen and were no longer tied to civil annexation. For a variety of reasons, all attempts failed to consolidate IPS with any of the other ten suburban school districts within Marion County.[9]

In 1961 special legislation was enacted to give the Marion County schools the flexibility lost by the 1959 Reorganization Act.[10] Under this legislation extension of the boundaries of a civil city automatically extended the corresponding school dis-

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6. Acts 1931, ch. 94, § 1, provided in relevant part:

> [I]n each civil city of this state having . . . more than three hundred thousand inhabitants there shall be a common school corporation hereinafter called the "school city" whose duties shall be co-extensive with the corporate boundaries of such civil city.

Although this Act was amended in 1955 in order to increase the size of the IPS Board, the provision concerning the boundaries of IPS remained unchanged. Acts 1955, ch. 123, § 1.

On March 15, 1969, two days after the Uni-Gov Act was signed into law, section 1 of the 1931 Act was again amended, this time deleting all reference to the correspondence of boundaries of IPS and Indianapolis. Acts 1969, ch. 283, § 1; Ind. Code § 20-3-11-1.

Although the 1931 statute applied only to the City of Indianapolis, the boundaries of school districts and municipalities were also coterminous elsewhere in Indiana. *See* 541 F. 2d at 1217.

7. Acts 1959, ch. 202, § 1; Ind. Code §§ 20-4-1-1 *et seq.*

8. Some seventy percent of the reorganized districts were not coterminous with other units of civil government. 541 F. 2d at 1217.

9. *See* 541 F. 2d at 1217-18. *See also* 368 F. Supp. at 1203-04.

10. Acts 1961, ch. 186; as amended, Ind. Code § 20-3-14.

trict boundaries.[11] In summary, with the exception of the two year period 1959-61, the expressed policy of the State of Indiana until 1969 was that IPS would expand as the City of Indianapolis expanded.

Against this backdrop, two pieces of legislation were enacted by the Indiana General Assembly in 1969. Most notable was the Uni-Gov Act which transformed the "old" City of Indianapolis and the rest of Marion County into a consolidated government.[12] Uni-Gov succeeded to most of the functions of the city and county governments and of numerous special service districts.[13]

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11. Section 9 of the 1961 statute, which applied only to the City of Indianapolis, provided in pertinent part:

> (a) Whenever the boundaries of any civil city are extended by a civil annexation . . . the boundaries of the school city which has jurisdiction over the area of such civil city or the major portion thereof shall be correspondingly extended by virtue of such civil annexation.

The expansion of the school boundaries under this provision was automatic unless the school city and the losing school corporation mutually agreed against expansion of school corporations. Section 9(c). In addition, the school corporation whose territory was to be taken could oppose the civil annexation in a remonstrance suit. Section 9(b). Under this provision, however, a remonstrance to both school and civil annexation was necessary.

Chapter 186 of the Acts of 1961 also provided for two means wherein IPS could expand independently of the city. Section 3 permitted expansion if the IPS Board and the losing school corporation mutually agreed that IPS could expand. Section 4 gave IPS the unilateral power of annexation subject to the right of the losing school district to oppose by remonstrance on educational grounds only. Ind. Code §§ 20-3-14-3 to 20-3-14-6. No significant action was taken by IPS under these two provisions because they proved to be ineffective.

12. This Act was officially entitled the "Consolidated, First-Class Cities and Counties Act." Acts 1969, ch. 173, § 101; Ind. Code §§ 18-4-1 *et seq.* *See* n. 2, *supra.*

13. Schools were specifically excluded from Uni-Gov as were some other governmental units, including *inter alia,* airport authority, health and hospital corporations, county department of welfare, housing authority, *etc.* Ind. Code § 18-4-3-14. Most of these units,

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Under prevailing Indiana law prior to 1969, the expansion of the City of Indianapolis to the Marion County lines carried out by the Uni-Gov Act would have automatically caused the concommitant expansion of IPS. But sixteen days before final passage of the Act, the General Assembly repealed section 9 of the 1961 Act.[14] This repeal for the first time separated the boundaries of IPS and the City of Indianapolis. This action had the effect of preventing the expansion of IPS boundaries. But for the repeal of the 1961 Act, IPS would now be coextensive with Marion County and this case would have a far different cast.[15] While we cannot say that this was done with a

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including the schools, were previously independent having a corporate and legal identity separate from the City of Indianapolis. Many of these units had been reorganized before passage of the Uni-Gov Act wherein their jurisdiction was expanded to the Marion County lines. As noted earlier, *see* n. 9 *supra,* all attempts to consolidate and reorganize the Marion County schools failed.

The effect of Uni-Gov on the schools, as with the other excluded governmental units, was to keep their independent and autonomous status. As developed more fully in the text, the Uni-Gov Act, by itself, did not freeze the boundaries of IPS; the Act did not even mention boundaries. The sole effect of Uni-Gov on the schools was to maintain their prior independent status.

14. Acts 1969, ch. 52, § 2.

15. Four pieces of legislation were adopted by the 96th Session of the General Assembly in 1969 which affected IPS and its boundaries. These statutes were all enacted within eighteen days of each other. On February 25, the General Assembly repealed section 9 of the 1961 Act which had permitted the automatic expansion of IPS boundaries. Acts 1969, ch. 52, § 2; Ind. Code § 20-3-14-11. On the same day, the General Assembly added section 9(a) to the 1961 Act. This amendment effectively nullified the 1931 Act which had defined the boundaries of IPS as being coterminous with those of the City of Indianapolis. Acts 1969, ch. 52, § 3; Ind. Code § 20-3-14-9.

On March 13, 1969, the Uni-Gov Act was signed into law. Acts 1969, ch. 173. Section 314 of that chapter provided in pertinent part:

> All other municipal corporations . . . shall not be affected by this Act . . . . Without limiting the generality of following enumeration, such municipal corporations, . . . . shall include . . . any school corporation, all or part of the territory of which is in the Consolidated City or County. Ind. Code § 18-4-3-14.

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discriminatory purpose of intent because the district court has never addressed the question and for that reason the case must be remanded, *see* Part III *infra*, it is clear that this repeal and the other legislation enacted satisfied any formal test for state action.

The situation here thus differs from *Milliken* in at least one important aspect. In *Milliken* the school boundaries which limited the area into which a remedy could extend had apparently developed without consideration of race. At least no one appears to have contended that the boundaries were the product of racially invidious decisions of the State. In the instant case the legislature has, while this litigation was pending, chosen to enlarge the boundary of the City of Indianapolis for many municipal purposes while retaining the old IPS boundary for school purposes.[16] As was shown, this separation of the Indianapolis city boundary from the school district boundary was contrary to the State's traditional policy.

State action being present, our query next turns to whether that action caused significant segregative districtwide effects. In what way did the State's choice of retaining the old IPS boundary in lieu of expanding it with the City boundary have a segregative impact? It did so, we think, in curtailing the power of IPS to remedy its own violations. Had IPS expanded with the City, it could have accomplished desegregation by spreading

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Two days later, on March 15, the General Assembly amended the 1931 Act, eliminating the provision that IPS boundaries must be coextensive with those of the City of Indianapolis. Acts 1969, ch. 283, § 1; Ind. Code § 20-3-11-1.

16. This is not therefore a case, as in *Milliken*, where the state merely failed to redraw school district lines which may have been neutrally drawn initially. Rather, this case is more similar to those where the state actually redraws the district lines. *See, e.g., Wright* v. *Council of City of Emporia*, 407 U. S. 451 (1972); *United States* v. *Scotland Neck Board of Education*, 407 U. S. 484 (1972). Here the 1969 repeal of the 1961 Act prevented and froze what would have been a natural expansion of the IPS boundaries when the City of Indianapolis expanded to the county lines.

its black school population throughout a larger area, much as the district court ordered. If IPS were recalcitrant about correcting its own violation, the district court could have more readily ordered such dispersal of the black school population without curtailment of district lines. This very lawsuit, challenging racial segregation in Indianapolis, was already pending when the legislative choice was made to confine IPS to its old boundary rather than make it coterminous with the City. In short, the combined 1969 legislation had the effect of ensuring that the effort to desegregate IPS (which had been initiated a year earlier by the Department of Justice) would not extend to the white suburban areas.

In light of the above, we hold that the passage of Uni-Gov and its companion legislation meets the requirements of *Milliken* and therefore can be used as a basis for imposing an interdistrict remedy if the district court finds that the General Assembly, in enacting the series of legislation, acted with a discriminatory intent or purpose.

B

It is generally agreed that racial residential patterns are reflected in the student composition of an area's public schools and that racial segregation in public schools and racial segregation in housing are integrally interrelated.[17] Metropolitan Indianapolis is no exception to this phenomenon. In 1970, 98.5% of all black people in Marion County lived in the "old" City of Indianapolis, the area served by IPS. 332 F. Supp. at 663. Thus we find that blacks are concentrated in the "old" city while the suburbs are almost entirely populated by whites. This racial division in residential patterns is reflected in the public schools of metropolitan Indianapolis. During the 1968-69 academic year, 96.8% of all black students within Marion County

17. If a school system follows a neighborhood attendance policy, as does IPS, the racial composition of a residential area directly affects the racial composition of the schools.

attended schools served by IPS. Thus IPS was at the time this suit was filed and continued to be[18] racially segregated from the outlying school districts.[19]

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18. The overall black student population in Marion County has increased from 21% in 1968-69 to 26% in 1976-77, a net increase of five percent. As the following table shows, however, this increase has not been uniform among the school districts.

PERCENTAGE OF BLACK STUDENTS IN MARION COUNTY SCHOOL DISTRICTS

| School District | 1968-69 | 1976-77 | net change |
|---|---|---|---|
| IPS | 34% | 45% | + 11% |
| Beech Grove | 0 | —* | —* |
| Decatur | 0 | — | — |
| Franklin | —* | — | — |
| Lawrence | — | 6 | + 6 |
| Perry | — | — | — |
| Pike | 4 | 17 | + 13 |
| Speedway | 0 | 1 | + 1 |
| Warren | — | 2 | + 2 |
| Washington | 6 | 17 | + 11 |
| Wayne | 1 | 2 | + 1 |

* Less than one percent.

The evidence thus shows IPS is becoming increasingly black (45% in 1976-77 v. 34% in 1968-69), while the suburbs remain overwhelmingly white. In 1976-77 the percentage of black students in seven of the ten suburban Marion County school districts was still less than two percent.

19. IPS is only one of eleven school districts in Marion County, the area covered by Uni-Gov. Although IPS serviced fifty-two percent of all Marion County public school students during the 1976-77 academic year, it serviced ninety percent of all the black students.

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Undoubtedly there are many contributing causes for racial segregation. But however complex the problem, it is clear that if residential segregation results from current or past segregative housing practices, there is a causal relation between those practices and the segregated schools.[20] Therefore, if the state has

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The following table shows the present racial disparity between IPS and the outlying districts.

| School District | Percent of Total Student Enrollment in County | Percent of Total Black Enrollment in County |
|---|---|---|
| IPS | 52% | 90% |
| Beech Grove | 2 | —* |
| Decatur | 3 | — |
| Franklin | 2 | — |
| Lawrence | 6 | 1 |
| Perry | 8 | — |
| Pike | 3 | 2 |
| Speedway | 1 | — |
| Warren | 7 | — |
| Washington | 9 | 6 |
| Wayne | 8 | 1 |
| | 101%** (156,812) | 100% (40,695) |

* Less than one-half of one percent.

** The total of 101% is due to rounding off to the nearest whole number for purposes of readability.

20. The converse is also true: the racial composition of a school can also affect residential patterns. This is particularly so for couples with young families, one of the most residentially mobile groups in society. Although choice of location largely depends on available housing and economics, it also depends to a degree on the local schools. The influence of school patterns was noted by the Supreme Court in *Swann* v. *Board of Education,* 402 U. S. 1, 20-21 (1971):

> People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.
>
> * * * * *

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participated in or contributed to these segregative housing practices either directly (*e.g.*, selective location of public housing) or indirectly (*e.g.*, involvement in discriminatory practices in the private housing market), it can be said that the state caused, at least in part, the segregation in schools.

That segregative housing practices can be the basis of an interdistrict school desegregation remedy was suggested by Mr. Justice Stewart's concurrence in *Milliken*.[21] Justice Stewart noted that if school segregation flows from a "purposeful, racially discriminatory use of state housing laws, then a decree calling for the transfer of pupils across district lines might well be appropriate." 418 U. S. at 755.

In *Evans* v. *Buchanan*, 393 F. Supp. 428 (D. Del. 1975), the district court justified submission of a metropolitan remedy for school desegregation in part on governmental involvement in fostering segregated housing, which in turn caused segregation in the schools. The three-judge court in *Evans* found the development of "indentifiable black schools mirrored population shifts," and that those population shifts resulted in part from "assistance, encouragement, and authorization by governmental policies."

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> It [location and closing of schools] may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.

*See also Keys* v. *School District No. 1*, 413 U. S. 189, 202-03 (1973).

Schools can also affect people other than families with school-aged children. Realtors, homeseekers, and prospective tenants often use the local schools (and their racial composition) as a key indicator as to the kind of neighborhood an area is or will become.

21. The Court in *Milliken* explicitly stated that "in its present position, the case does not present any question concerning possible state housing violations," 418 U. S. at 728 n. 7, noting that the issue had not been considered by the court of appeals. Thus *Milliken* did not foreclose the use of housing violations as a basis for imposing interdistrict remedies as some would suggest. *See* 541 F. 2d at 1228 n. 8 (Tone, J., dissenting).

*Id.* at 434. The Supreme Court summarily affirmed this decision, 423 U. S. 963 (1975), and the Third Circuit subsequently affirmed the actual imposition of an interdistrict remedy. 555 F. 2d 373 (3d Cir. 1977), *modifying and aff'g*, 414 F. Supp. 328 (D. Del. 1976).

Considering the foregoing observations, we hold that an interdistrict desegregation remedy is appropriate if the following circumstances are shown to exist (given the fact that there is a vast racial disparity between IPS and the surrounding school districts within the "new" City of Indianapolis): (1) that discriminatory practices have caused segregative residential housing patterns and population shifts; (2) that state action, at whatever level, by either direct or indirect action, initiated, supported, or contributed to these practices and the resulting housing patterns and population shifts; and (3) that although the state action need not be the sole cause of these effects, it must have had a significant rather than a *de minimis* effect. Finally, an interdistrict remedy may be appropriate even though the state discriminatory housing practices have ceased if it is shown that prior discriminatory practices have a continuing segregative effect on housing patterns (and in turn on school attendance patterns) within the Indianapolis metropolitan area.

The record shows that the district court already has received evidence and has made certain findings in the area of housing discrimination. *See Indianapolis I*, 338 F. Supp. at 1204-05; *Indianapolis IV*, 419 F. Supp. at 183-85. It is important, however, that on remand the district court specify what state responsible housing practices of a discriminatory nature, if any, have resulted, at least in part, in segregative residential patterns. This is necessary not only to determine initially whether an interdistrict remedy is appropriate, but also to fashion an appropriate remedy.[22]

22. In *Dayton Board of Education* v. *Brinkman*, 45 U. S. L. W. 4910 (June 27, 1977), the Supreme Court held that a district court, upon finding a constitutional violation, must first determine

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C

Although we hold that either the enactment of Uni-Gov and its companion legislation or state discriminatory housing practices may provide a basis for implementing interdistrict relief, we must address one further point. The suburban school officials may not maintain that their districts must be excluded from any interdistrict remedy because they may be innocent of committing any constitutional violations, and that they should not be held responsible for the acts of the state legislators or other state subdivisions such as a local housing authority or a zoning board. The commands of the Fourteenth Amendment are directed at the state and cannot be avoided by a fragmentation of responsibility among various agents. *Cooper* v. *Aaron*, 358 U. S. 1, 15-17 (1958). If the state has contributed to the separation of the races, it has the obligation to remedy the constitutional violations. That remedy may include school districts which are its instrumentalities and which were the product of the violation. Thus, if state discriminatory housing practices have a substantial interdistrict effect, it is appropriate to require school authorities to remedy the effects even though they did not themselves cause this aspect of school segregation.[23] As Chief Justice Burger said in *Milliken*:

> Of course, no state law is above the Constitution. School district lines and the present laws with respect to local

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how much incremental effect the violations had on the racial imbalance in the schools. As a remedy can be designed to redress only the difference between the present racial distribution and what it would have been in the absence of constitutional violations, specific and detailed findings are required on remand.

23. That a remedy may include agencies of the state not themselves implicated in the constitutional violation was again recognized in *Milliken*. In that case the Court acknowledged that a desegregation remedy could have included the suburbs had the evidence shown that the violations by the Detroit school board produced significant interdistrict segregative effects. *Milliken* v. *Bradley*, 418 U. S. 717, 744-45, 748 (1974). *See also Hills* v. *Gautreaux*, 425 U. S. 284, 292-94, 296 n. 12 (1976).

control, are not sacrosanct and if they conflict with the Fourteenth Amendment federal courts have a duty to prescribe appropriate remedies. 418 U. S. at 744.

## III

Even though segregative action for which the state or its agents may have been responsible comes within the governing principles of *Milliken*, the district court on remand must also determine whether that action (or inaction) was made with a racially discriminatory purpose.

In *Washington* v. *Davis*, 426 U. S. 229 (1976), the Supreme Court held that state action is not racially discriminatory within the meaning of the Equal Protection Clause unless the action was taken for the purpose of discriminating between the races. If *Davis* did not change the law,[24] it at least changed the way lower courts had consistently interpreted it.[25] Because that case was decided after the instant case was last before the district court, neither the Government nor the intervening plaintiffs offered any evidence showing a racially discriminatory purpose.[26] Statements in earlier opinions in this case suggesting that there was no showing of discriminatory purpose should be disregarded in view of the fact that such showing was not deemed relevant at the time. Accordingly, we must remand this case

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24. *See, e.g., Palmer* v. *Thompson*, 403 U. S. 217 (1971).

25. *See, e.g.*, cases collected in *Washington* v. *Davis*, 426 U. S. at 244 n. 12. Fo rexample, in *Hawkins* v. *Town of Shaw*, 461 F. 2d 1171 (5th Cir. 1972) (*en banc*), one of the decisions explicitly disapproved in *Davis*, the court stated: "In order to prevail in a case of this type it is not necessary to prove intent, motive or purpose to discriminate on the part of city officials." *Id.* at 1172.

26. As Judge Tone recognized in dissenting in our previous opinion:

> The [plaintiffs] do not argue that the evidence shows a racially discriminatory purpose. In their briefs, filed before the decision in *Washington* v. *Davis*, the government assumes, and the intervening plaintiffs argue, that such a purpose need not be shown. *United States* v. *Board of School Commissioners*, 541 F. 2d 1211, 1226 (7th Cir. 1976).

so that the district court may make findings on the question of intent consistent with *Davis* and *Arlington Heights.*

Because of the protraction of this litigation, we make the following observations with the hope that this matter can be expedited and that further appeals can be avoided.

The key to an understanding of *Washington* v. *Davis* can be found in the following passages. Courts must adhere "to the basic equal protection principle that the invidious quality of a law must ultimately be traced to a racially discriminatory purpose. . . . This is not to say that the necessary discriminatory racial purpose must be expressed or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. . . . Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." 426 U. S. at 240-42.

The Court amplified its intent requirement in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977). It noted that "*Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes." Nor must it be shown that the intent to discriminate was the dominant or primary purpose. Rather the segregative intent need be only a "motivating factor in the decision" to establish a constitutional violation.[27] *Id.* at 265-66.

The Court in *Arlington Heights* further stated: "Determining whether invidious discriminatory purpose was a motivating fac-

27. Thus a complainant does not have to establish that "but for" the segregative intent the decision would not have been made. Such rigorous proof is not required not only because of the extreme evidentiary difficulties in proving that fact, *see Washington* v. *Davis,* 426 U. S. at 253 (Stevens, J., *concurring*); *Palmer* v. *Thompson,* 403 U. S. 217, 224-25 (1971), but also because an illicit motive may be only subordinate and still affect the outcome of a decision. *See* Best, *Palmer* v. *Thompson: An Approach to the Problem of Unconstitutional Legislative Motive,* 1971 Sup. Ct. Rev. 95, 119.

tor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may available." *Id.* at 266. The first and often the most probative indicia of discriminatory purpose is the disproportionate impact or effect a law or other official act may have.[28] In some circumstances impact alone may be sufficient.[29] For example, where the discriminatory impact is great that impact may "demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." 426 U. S. at 242. As Mr. Justice Stevens observed in his concurrence in *Davis,* "when the disproportion is . . . dramatic . . . it really does not matter whether the standard is phrased in terms of purpose or effect." *Id.* at 254.

Where the effect or impact is not so great so as to itself infer segregative intent, a number of factors were noted to be relevant by the Court in *Arlington Heights.* They include:

(1) the historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes;

(2) the specific sequence of events leading up to the challenged decision;

(3) departures from the normal procedural sequence;

(4) substantive departures, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached; and

(5) the legislative or administrative history of a decision. 429 U. S. at 267-68.

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28. The impact of the official action is usually the first factor to be examined because, regardless of the presence of a segregative intent, a law without a discriminatory impact does not give rise to a cause of action.

29. This is not to say that it is the impact or effect which triggers the constitutional violation. Rather, when the discriminatory purpose becomes so stark, it becomes obvious that there could be no other basis for the action other than a discriminatory one.

Discriminatory purpose is inferred from considering the totality of the available circumstantial evidence. *Davis,* 426 U. S. at 229. Even if no individual act carries unmistakable signs of racial purpose, a clear pattern is sufficient to give rise to a permissible inference of segregative intent. *Armstrong* v. *Brennan,* 539 F. 2d 625, 637 (7th Cir. 1976).

*Arlington Heights,* while amplifying the intent requirement set forth in *Davis,* did not answer the crucial question of what type of intent a plaintiff must show in order to make out a prima facie case under the Equal Protection Clause. In short, *Arlington Heights* instructed the lower courts where to look for the required intent without defining its imminent nature. It is clear, however, that the *Davis* requirement of discriminatory purpose is not *scienter* (as known in the criminal law) and is not the subjective motives of individuals state officials, be they legislators or members of a local school or zoning board.[30] Such a test would pose an impenetrable evidentiary barrier for plaintiffs, for in an age when it is unfashionable for state officials to openly express racial hostility, direct evidence of overt bigotry will be impossible to find. Because a subjective test fails to measure the presence of discriminatory purpose when officials act discreetly, it is an outdated tool in the enforcement of the Equal Protection Clause.[31]

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30. Thus the terms "purpose" and "intent" must be distinguished from the word "motive" which usually refers to the subjective intent of individuals.

31. A subjective test for intent has other crippling disadvantages as well. Under such a standard, it is unclear whose intent it is appropriate for the courts to examine. For example, it was the General Assembly which enacted the Uni-Gov Act and its companion legislation. Arguably, we therefore ought to scrutinize the legislative history of that legislation as well as any other records of what the members of the General Assembly were thinking during that period for evidence of subjective discriminatory intent. But which legislators' minds should be consider? Only those who voted in favor of the legislation? But what of those legislators who voted for legislation but did not harbor any racial motive? Should their votes be discarded? Likewise, should the votes of those who were racially moti-

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There is, however, a more fundamental barrier to the use of a subjective standard of intent which would direct courts to evaluate the motives of the individuals who comprise an institution or state agency. It has been established since *Fletcher* v. *Peck,* 10 U. S. (6 Cranch) 87, 130-31 (1810), that a court may not invalidate legislation based on the improper motives of the legislators who enacted it. In *Palmer* v. *Thompson,* 403 U. S. 217, 224-26 (1971), the Supreme Court held that legislation that could be justified by racially neutral reasons could not be attacked on the ground that legislators were motivated by racial bigotry. Moreover, the Court in *Davis* held that this aspect of *Palmer* remained law, by interpreting *Palmer* as holding "that the legitimate purposes of the ordinance . . . were not open to impeachment by evidence that the councilmen were actually motivated by racial considerations." 426 U. S. at 243. If discriminatory purpose is required for a constitutional violation, the inevitable conclusion is that the "segregative purpose or intent" relevant for equal protection analysis differs from the motivation of individual decisionmakers.

It is clear, therefore, that discriminatory purpose for constitutional analysis is to be gleaned not from individual officials but from the relevant governmental institutions. As a subjective test would be impossible to apply in such circumstances, the courts are driven to adopt an objective criterion in deter-

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vated be considered in judging the legislation? As Mr. Justice Stevens observed in *Washington* v. *Davis,* "A law conscripting clerics should not be invalidated because an atheist voted for it." 426 U. S. at 253.

There is a more basic problem in limiting a search to the subjective motives of the individual legislators. To so limit our inquiry is to ignore the fact that the legislature frequently is nothing but a conduit for the desires of the individuals or interest groups which have influence and sources of power. To be comprehensive in our search we would have to examine their motives. At that point, however, we would be in a quandary, for there is no way to determine with any certainty the degree to which bigotry on the part of these persons or interest groups actually affected the General Assembly's decision.

mining whether the challenged state action is imbued with a segregative intent or purpose. Such criterion must include an examination of the institutional policy that underlies the action.[32] (By "policy" we mean a deliberate course of action, selected among alternatives, that is deemed advantageous or expedient.) We agree with the Sixth Circuit when it said:

> A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively established that their action or inaction was a consistent and resolute application of racially neutral policies. *NAACP* v. *Lansing Board of Education,* 559 F. 2d 1042, 1046-47 (6th Cir. 1977), *quoting Oliver* v. *Michigan State Board of Education,* 508 F. 2d 178, 182 (6th Cir. 1974).

Thus if plaintiffs establish either that the governmental action or inaction under scrutiny does not further the governmental policies or that the government ignored less segregative options which would have furthered its policies as effectively as the more segregative option it chose, *see Armstrong* v. *Brennan,* 539 F. 2d 625, 636 (7th Cir. 1976), then a prima facie case of discriminatory intent or purpose has been made out. This inference is justifiable because governmental institutions must be presumed to have knowledge of the natural and foreseeable consequences of their action of inaction, and because there are rarely significant nonracial reasons for preferring a more rather than less segregative alternative.

## IV

The district court's injunctive order against the Housing Authority of the City of Indianapolis ("HACI") must also be reexamined in light of *Washington* v. *Davis* and *Arlington*

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32. *See generally,* Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto De Jure Distinction,* 86 Yale L. J. 317, 333-43 (1976).

*Heights* for reasons which we shall develop. But first we state the facts as shown by the record before us.

Upon remand from this court in 1974, the district court entertained a cross-complaint brought by the IPS Board against the Metropolitan Development Commission of Marion County ("Commission") and the HACI, which were brought into the case as additional defendants. The cross-complaint alleged that the Commission and HACI materially contributed to segregation in IPS by consistently building public housing projects within the borders of IPS rather than in suburban areas, despite HACI's authority to build housing within five miles of the city limits and the Commission's county-wide jurisdiction. The court found that the Board's allegation was correct, and concluded that the inevitable effect of this policy was to increase the racial disparity between IPS and the suburban school districts because 98% of public housing tenants were black.

The court placed a major part of the responsibility for the lack of public housing in the suburbs on the resistance of suburban officials to the movement of blacks into their areas. It found:

> Suburban Marion County has resisted the erection of public housing projects outside IPS territory, suburban Marion County officials have refused to cooperate with HUD on the location of such projects, and the customs and usages of both the officials and inhabitants of such areas has been to discourage blacks from seeking to purchase or rent homes therein, all as shown in detail in previous opinions of this Court. 419 F. Supp. at 183.

To remedy the segregative effect of the placement of public housing projects, the court enjoined HACI from building future projects within IPS.[33] It also prohibited HACI from reopening Lockefield Gardens, a vacant project, to anyone but elderly tenants. *Id.* at 186.

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33. HACI was not prohibited under the order from building projects outside of IPS.

The district court's injunction rested on the conclusion that HACI and the Commission had violated the Equal Protection Clause. The court's holding was based on two findings: first, HACI and the Commission always located public housing within IPS even though they had authority to build in the suburbs; and second, suburban officials consistently resisted the construction of public housing outside of IPS. Although the court's findings show that the policies pursued by HACI and the Commission produced racial discriminatory effects, under *Davis* and *Arlington Heights* discriminatory impact alone does not generally demonstrate a constitutional violation.

The district court did not determine whether HACI or the Commission acted with an invidious purpose in limiting the construction of public housing to IPS. Accordingly, it will be necessary to vacate the order and remand the case to the district court to make findings whether HACI and the Commission acted with discriminatory intent. If they did, an injunctive order similar to the one appealed from would be appropriate.

But it is also possible that the actions of both agencies were totally devoid of discriminatory intent, and they failed to build public housing in the suburbs soley because suburban officials would not permit them to do so. Such a finding, however, would not end the inquiry. If it is determined that some or all of the suburbs resisted public housing or refused to cooperate with HACI's effort to go beyond the boundaries of IPS on racial grounds and with the segregative intent to confine the black people of Marion County to the "black ghetto" of the inner city, such a determination alone would justify an injunctive order similar to the one appealed from.[34]

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34. It is true that the suburbs were not named as defendants in the IPS Board's cross-complaint. This fact is irrelevant, however, to the question of whether the requested injunctive relief should be granted against HACI. Ordinarily a person should not be held legally accountable for the action of a third party. But in the factual situation before us that axiomatic proposition is inapplicable. It does not matter whether HACI itself had a discriminatory intent in limiting

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We also remand the interdistrict busing order for the reasons outlined in this opinion. Although the district judge's previous findings and discussions indicate that he had in mind the principle stressed in *Dayton* v. *Brinkman*, ..... U. S. ..... (1977), namely, that once a constitutional violation is found, the court must tailor the scope of the remedy to fit the nature of the violation, we believe that the district court should explicitly consider the appropriate application of that principle to the formulation of any interdistrict remedy.

The orders appealed from are vacated and the case is remanded for further proceedings consistent with this opinion.

FAIRCHILD, *Chief Judge*, concurring. I interpret the directions given by the Supreme Court on remand as requiring a determination whether or not (1) the state's separation of the municipal boundary from the school district boundary was done with intent to maintain the concentration of black students in IPS schools and (2) the Housing Authority's (and Commission's) choices in the location of housing were made with similar discriminatory intent. If the record required us to say as a matter of law that there was no such intent, we would reverse and direct denial of interdistrict relief and dismissal of the cross-complaint against HACI. If it required us to say as a matter of law that such intent was present, we would either affirm the decree, modify it, or reverse and remand for modification by the district court.

I agree with Judge Swygert that existence or absence of intent cannot be determined as a matter of law from the present

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public housing to IPS or whether the suburbs with discriminatory intent refused to cooperate, thus preventing HACI from expanding public housing projects beyond the IPS boundary. The result was the same and HACI, as a public agency, should not be free from an injunctive order merely because its conduct was forced from the outside. It should also be kept in mind that the remedy sought by the cross-complaint is against HACI—not against the suburbs—and therefore the inquiry may be extended to what if any suburban conduct with discriminatory intent influenced the action of HACI.

record, particularly since that issue was not really tried, and therefore agree that we should reverse and remand for further proceedings and findings on the issue of intent. If such intent be found with respect to (1) or (2), or both, the district court should impose an appropriate interdistrict desegregation remedy. If such intent be found with respect to (2), the district court should also enter an appropriate injunction against HACI (and Commission). I concur in reversal with those directions.

I agree, generally, with Parts I and II of the opinion prepared by Judge Swygert.

With all respect, I do not subscribe to all the matters stated in Part III. In particular, I do not agree with the analysis of the issue of intent in terms of "type," "subjective test," or "standard" of intent.

I recognize, to be sure, the difficulties attendant upon determination of the "intent" with which an action is taken by a state legislature or other multi-member governmental body. It is often difficult to identify the group of individuals who controlled a particular decision and whose individual purposes in making it are therefore the most significant.

Fundamentally, however, the intent of a body of individuals with respect to a particular act of the body must be determined by the same process as an individual's intent is determined. It is to be inferred from acts (including acts and statements of individuals which can reasonably be attributed to the body) and surrounding circumstances (including foreseeable consequences of the act in question).

This is essentially a fact finding process. The Supreme Court has provided guidance in *Arlington Heights,* 429 U. S. at 266-68. As the Court stated:

> The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed.

429 U. S. at 268.

Part IV deals with the injunction entered upon the IPS cross-complaint, forbidding HACI to build future public housing within IPS. I agree that there must be a finding as to the intent with which HACI chose the locations of its projects.

Where a suburb had power to prevent HACI from locating a project within it, that suburb's attitude would be relevant in the process of finding whether HACI acted with discriminatory intent in deciding to build elsewhere. Once HACI were found, however, to have acted with discriminatory intent, it is hard to see how the guilt or innocence of various suburbs would affect the scope of an injunction against HACI.

If and to the extent that relief were sought against a suburb on a claim that it violated rights either by preventing students from attending its schools or by preventing people from obtaining housing within its borders, its discriminatory intent would, of course, be relevant.

TONE, *Circuit Judge*, dissenting. I remain of the view, stated in my dissent when the case was here before certiorari and remand, 541 F. 2d at 1224, that the record contains no evidence that would support a finding of racially discriminatory purpose with respect to either Uni-Gov or selection of public housing sites. There is no need to repeat what was said there.

If the issue of discriminatory purpose had not been previously addressed by the parties or the trial court, and had first entered the case because of the Supreme Court's remand, it would be appropriate for us to remand to the District Court for the taking of evidence and findings on that issue. But that issue was previously in the case. Discriminatory purpose was specifically pleaded in paragraph 10 of the intervening plaintiffs' amended complaint, and evidence was offered in an attempt to prove that allegation after our last remand.[1] This was not an irrelevant

1. Which was for a determination of "whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with *Milliken*." 503 F. 2d 68, 86.

allegation and it was not treated as such by counsel for the intervening plaintiffs, who understandably wanted two strings to their bow,[2] by counsel for the defendants, or by the district judge. The proof failed, and the district judge carefully, as I read his opinion, refrained from finding the presence of discriminatory purpose. The tenor of his findings on both the Uni-Gov and public housing issues was such that it is inconceivable that he would not have found discriminatory purpose if he had believed it warranted by the evidence. 419 F. Supp. at 182-183. In this tenth year of the litigation, I think that should be an end to the matter. The usual rule should be applied, and we should not send the case back to permit the intervening plaintiffs to make another attempt to prove allegations they have already tried but failed to prove, while a complete remedy for intra-district violations conclusively adjudicated in 1973 (474 F. 2d 81) is delayed on the chance that an interdistrict remedy will ultimately emerge.[3]

Turning to the issues on remand, I shall not attempt to state the respects in which I disagree with the opinion announcing the judgment of the court, which are for the most part apparent from my earlier dissent, except to say that until now the District Court and this court have recognized that the only material distinctions between the facts in this case and those in *Milliken* v. *Bradley* lay in Uni-Gov and the siting of public housing

2. That the Court would hold as it did in *Washington* v. *Davis*, 426 U. S. 229 (1976), was, at the very least, foreseeable as a possibility. See 426 U. S. at 239-245; and see my earlier dissent, 541 F. 2d at 1224.

3. The brief for the United States filed in the Supreme Court in connection with the 1976 appeals and petitions for certiorari in that Court stated as follows:

> The United States commenced this suit to challenge racial discrimination by and within IPS. It prevailed on its claims. Full relief has been delayed for several years, however, while the district court has considered an expanded, inter-district remedy that the United States did not seek. In our view this delay has been fruitless, because the evidence has not demonstrated any purposeful inter-district racial discrimination of the sort that would justify an inter-district mandatory reassignment of students.

projects by HACI. As for Part III of the opinion, with all respect, I do not think we make the district judge's task any easier by providing him with an advisory interpretation of Supreme Court decisions (which he can read as well as we can) when we cannot agree among ourselves how they should be interpreted.

A true Copy:

Teste:

.....

*Clerk of the United States Court of Appeals for the Seventh Circuit*

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indianapolis Division

United States of America,
*Plaintiff,*

Donny Brurell Buckley, Alycia Marquese Buckley, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,
*Intervening Plaintiffs,*

Indiana State Teachers Association,
*Intervening Plaintiff,*

*vs.*

The Board of School Commissioners of the City of Indianapolis, Indiana; Karl R. Kalp, as Superintendent of Schools; Mary E. Busch, as President of The Board of School Commissioners; Walter Knorr, Martha L. McCardle, William M. S. Myers, W. Fred Ratcliff, James R. Riggs, Patricia Welch, Members of The Board of School Commissioners of the City of Indianapolis,
*Defendants,*

Otis R. Bowen, as Governor of the State of Indiana; Theodore L. Sendak, as Attorney General of the State of Indiana; Harold H. Negley, as Superintendent of Public Instruction of the State of Indiana; The Metropolitan School District of Decatur Township, Marion County, In-

No. IP 68-C-225

(Caption continued on next page.)

(Caption continued from preceding page.)

diana; The Franklin Township Community School Corporation, Marion County, Indiana; The Metropolitan School District of Lawrence Township, Marion County, Indiana; The Metropolitan School District of Perry Township, Marion County, Indiana; The Metropolitan School District of Pike Township, Marion County. Indiana; The Metropolitan School District of Warren Township, Marion County, Indiana; The Metropolitan School District of Washington Township, Marion County, Indiana; The Metropolitan School District of Wayne Township, Marion County, Indiana; School City of Beech Grove, Marion County, Indiana; School Town of Speedway, Marion County, Indiana; The Metropolitan Development Commission of Marion County; The Housing Authority of the City of Indianapolis; The Indiana State Board of Education a public corporate body;

*Added Defendants,*

Citizens for Quality Schools, Inc.;
*Intervening Defendant,*

Coalition for Integrated Education;
*Amicus Curiae.*

The Board of School Commissioners of the City of Indianapolis, Indiana,
*Cross-Claimants,*

*vs.*

The Metropolitan Development Commission of Marion County, The Housing Authority of the City of Indianapolis,
*Cross-Defendants.*

No. IP 68-C-225

## MEMORANDUM OF DECISION

This cause comes before the court pursuant to remand from the United States Court of Appeals for the Seventh Circuit, 573 F. 2d 400 (1978).

To summarize briefly the more recent rulings in the case, the Court of Appeals held in 1976 that the action of the General Assembly of Indiana in passing legislation in 1969 to enlarge the City of Indianapolis to include all of Marion County, with the exception of three cities and towns, ("Uni-Gov"), while at the same time repealing a previous law providing that the boundaries of the civil city and the school city would, generally speaking, be coterminous, had an obvious racial segregative impact, and was a substantial cause of interdistrict segregation. *U. S.* v. *Bd. of Sch. Com'rs of City of Indianapolis,* 541 F. 2d 1211 at 1220. It also held that action of the added defendant Housing Authority of the City of Indianapolis ("HACI") in locating all of its public housing projects within IPS borders, although it had the authority to place them in the suburbs, produced discriminatory effects both within IPS and the suburbs. *Id.,* p. 1223. The Court then found that this court's order, 419 F. Supp. 180 (1975), which ordered the transfer of black students from IPS to various suburban schools within Marion County, was in accord with the principles of *Milliken* v. *Bradley,* 418 U. S. 717, 94 S. Ct. 3112, 41 L. Ed. 2d 1069 (1974), and affirmed the same, 541 F. 2d 1211 (1976).

The Supreme Court of the United States vacated the judgment and remanded the case to the Court of Appeals for further consideration in light of *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U. S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977), and *Washington* v. *Davis,* 426 U. S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976). On remand the Court of Appeals reaffirmed that the passage of Uni-Gov and its companion legislation meets the requirements of *Milliken* and therefore can be used as a basis for imposing an

interdistrict remedy if the district court finds that the General Assembly, in enacting the series of legislation, acted with a racially discriminatory intent or purpose. 573 F. 2d 400, 408. The purpose of the remand, therefore, is for this court to make findings as to the intent of the General Assembly, as well as to the intent of HACI and the Metropolitan Development Commission of Marion County ("Commission") with respect to the location of public housing.

In *Arlington Heights* the Court laid down some of the criteria to be considered in determining whether a racially discriminatory purpose entered into a challenged action. "The impact of the official action—whether it 'bears more heavily on one race than another,' *Washington* v. *Davis,* 426 U. S. at 242—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . ." 50 L. Ed. 2d 450, 465.

The Court then went on to list other evidentiary considerations:

(1) "The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes . . .

(2) "The specific sequence of events leading up to the challenged decision. . . .

(3) "Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role.

(4) "Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

(5) "The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking

body, minutes of its meetings, or reports. . . ." *Id.*, pp. 465, 466.

The court will now consider the application of such criteria to the facts of this case.

## I. *Historical Background*

The situation of the Negro in Indiana, 1800-1971, was described in this court's first opinion in this case, 332 F. Supp. 655 (1971). The facts set out therein have never been challenged, and are a part of the law of this case. Such facts show that Negroes were held as slaves in Indiana, the provisions of its constitution to the contrary notwithstanding, that they had no right to vote, nor to serve in the militia, nor to intermarry with whites, nor to give testimony as a witness in a case involving a white party. The laws against serving in the militia and against intermarriage were not repealed until 1936 and 1965, respectively.

Further facts are that the Indiana Constitution of 1851 prohibited Negroes and mulattoes from coming into the state. Until after World War II, Negroes were rarely admitted, save on a segregated basis, to theatres, public parks, State parks, schools, or public hospitals. Housing was segregated in Indianapolis and Marion County until a date past the filing of this suit in 1968. Negroes were discouraged from purchasing homes in "white" neighborhoods by realtors who refused to show them such homes, by use of a "two-price" system and by advertising housing for "colored" in Indianapolis newspapers. Racial covenants barring Negroes were made a part of various plats in suburban areas, and were enforced by the courts until 1948. An Indianapolis ordinance in 1926 made it a crime for a Negro to live in a white area, and vice versa. Pioneering Negroes who succeeded in penetrating a white neighborhood were harassed by threatening and obscene telephone calls and rocks hurled through window. Customs and usage dictated that Negroes were

not to stay overnight in small towns and their departure was enforced by the police.

In the area of schools, Negroes, mulattoes and their children were barred from admission to the common schools by an act of 1861. In 1869, after the adoption of the Fourteenth Amendment, a law was adopted which provided for the education of Negro children, but only in segregated schools. The Supreme Court of Indiana held as recently as 1926 that Negro children were not entitled to admission in common schools provided for the education of white children, a policy legislatively recognized again in 1935. Desegregation, on a phased basis (one grade per year), was not required until 1949.

The added defendant suburban school corporation of Marion County, the record shows, have entered into a great number of interdistrict cooperative educational and vocational plans with each other and with districts outside the county. However, they have entered into none with IPS, although IPS has initiated such discussions. The only perceived difference between IPS and other districts (other than size) is race.

In 1868 Indianapolis erected a new school house and, anticipating the 1869 legislation, assigned the old building on Market Street for the education of Negro children. Thus the Indianapolis schools started educating the Negro child on a segregated basis and continue to do so until this day, inasmuch as several all-back elementary schools remain in use.

From the foregoing, it will be noted that Indiana, unlike most states in the north and west, practiced *de jure* segregation by act of the General Assembly, just as was true in the southern and border states. *Brown* v. *Board of Education,* 347 U. S. 483 (1954), therefore imposed upon Indiana and upon Indiana communities such as Indianapolis, which had practiced segregation in its schools, an instant duty to desegregate.

However, the law of this case is that successive School Boards of the City of Indianapolis after *Brown* continued policies of

*de jure* segregation in the operation of IPS up until the time of this court's first decision in 1971, aided and abetted by officials of the State of Indiana. During the same period of time (1954-1971), the HACI, with the approval of the Commission, built numerous public housing projects in IPS territory, inhabited 98% by Negroes, but none in the territory of any of the suburban Marion County defendants, all of whom have consistently opposed such housing projects. The suburban defendants also unanimously opposed consolidation of all Marion County schools, as proposed pursuant to the Indiana School Reorganization Act of 1959, and they were successful.

As heretofore set out, the law of Indiana from the adoption of its Constitution of 1851 until 1959 was that the boundaries of a school city and of a civil city were coterminous. 332 F. Supp. 655, 675, n. 86. In 1959 the Indiana School Reorganization Act, I. C. 1971, 20-4-1-1, et seq., provided that reorganized districts need not be coterminous, but in 1961 it was again provided by Acts 1961, ch. 186, § 1, I. C. 1971, 20-3-14-1, et seq., that in counties having a city of the first class (Marion County), the extension of the boundaries of a civil city would automatically extend the school city boundaries, unless mutually agreed to the contrary. Thus for the period 1851-1969, except for the two year period 1959-1961, it was the law that any annexation of territory by the City of Indianapolis carried with it a like annexation of territory by IPS.

## II. *Sequence of Events Leading to Repeal of 1961 Act and the Enactment of Uni-Gov*

The added defendant Commission and its president participated in drafting Uni-Gov. It had done planning studies with respect to population growth in Marion County and as to where schools should be located. The Mayor of Indianapolis, a former member of the IPS School Board, appointed a task force for Uni-Gov called the Greater Indianapolis Progress Committee. All members of the General Assembly from the

Marion County area were ex officio members of this committee. In short, Uni-Gov did not arise from some general impulse on the part of the entire General Assembly, but was envisioned, packaged and sold to the General Assembly by various Marion County and Indianapolis officials.

A public meeting was held November 27, 1968 and a draft was discussed. Such draft made no mention of schools, but opposition to the inclusion of schools was voiced at the meeting. Thereafter, a section was added to the draft providing that schools were excluded from the consolidation and expansion of the City of Indianapolis, and a separate bill was drafted, introduced, and passed by the General Assembly under an emergency clause, repealing that section of the 1961 Act which provided that the boundaries of the City of Indianapolis and IPS would be coterminous. Following all this, the Uni-Gov Act was passed.

The Mayor, when testifying as a witness, gave no educational or governmental reason for excluding the schools from the reach of Uni-Gov. He simply (and no doubt accurately) stated that the Uni-Gov bill would not have passed had the schools been included. The inference is that the representatives elected by the vote of suburban residents—many of whom had recently moved to the suburbs from the central city to escape the threat of desegregation posed by the filing of this very suit in 1968—would have voted against Uni-Gov but for exclusion of the schools.

III. *Departures from Normal—Legislative History.*

The evidence discloses no departure from normal procedural sequence, but the substantive departure is obvious. After 133 years of dehumanizing the Negro citizen through its laws, the General Assembly began in 1949 to attempt to right its previous wrongs. It enacted the school desegregation act in that year, and in subsequent years repealed the anti-miscegenation law, and other vestiges of past discrimination. In 1961 it enacted the

law restoring the long established rule that the school city of Indianapolis should expand with the civil city.

Following the decision in *Brown* v. *Board of Education*, 347 U. S. 483, in 1954 it became the duty of every member of the General Assembly, under his oath to support and defend the Constitution of the United States, to assist in desegregating the Indianapolis school system. The necessity of obtaining a wide dispersal of Negro school children in order to secure a stable plan was obvious in 1969, as a result of the dreary experience of resegregation in such places as Atlanta, Georgia, Washington, D. C., and elsewhere, which was widely known at that time. However, the General Assembly reversed its forward progress and departed from its long established boundary policy by repealing the crucial section of the 1961 Act, and eliminating the schools from Uni-Gov.

No further legislative history of Uni-Gov and companion legislation is available, since the Indiana General Assembly does not keep any record of its proceedings save the daily journal which records only motions and the results of roll calls.

## IV. *Findings and Conclusions—Legislation*

Considering all of the foregoing facts, it is perfectly obvious to this court, and it therefore finds, that the action of the General Assembly above discussed were done, at least in part, with the racially discriminatory intent and purpose of confining black students in the IPS school system to the 1969 boundaries of that system, thereby perpetuating the segregated white schools in suburban Marion County.

It was virtually identical action on the part of the General Assembly of Delaware in passing the Education Advancement Act of 1968 which caused the district court in Delaware to order the consolidation of the 88% black public schools of Wilmington with white suburban school of New Castle County. *Evans* v. *Buchanan*, 393 F. Supp. 428 (1975), aff'd, per curiam,

423 U. S. 963, 96 S. Ct. 381, 46 L. Ed. 2d 293 (1975). In that case the General Assembly enacted a bill calling for the reorganization of Delaware schools, but provided that the boundaries of the Wilmington schools, which contained a huge majority of black students, could not be changed. The Delaware court concluded that the Act precluded the State Board of Education (charged with the duty of desegregating Wilmington) from considering the "integrative opportunities" of redistricting in New Castle County in any meaningful way, that when the Act was passed the State Board had not satisfied its obligation to eliminate the vestiges of *de jure* segregation in the Wilmington schools, and that therefore the Act constituted a suspect classification, with no compelling justification therefor, since it had a significant racial impact on the policies of the State Board. 393 F. Supp. 428 at 442, 443.

## V. *The Housing Violations*

Once again this court refers to the previous record in this case. It found as a fact in its 1973 opinion as follows: ". . . [T]here can be little doubt that the principal factor which has caused members of the Negro race to be confined to living in certain limited areas (commonly called ghettos) in the urban centers in the north, including Indianapolis, has been racial discrimination in housing which has prevented them from living any place else." 368 F. Supp. 1191, 1204. This finding was specifically approved by the Court of Appeals in its 1976 opinion. 541 F. 2d 1211, 1222. Various aspects of racial discrimination in housing by realtors licensed by the State, by state courts and legislative bodies, and by private citizens, have been set out in part I hereof.

Against this background of racial discrimination, can it be said to be a mere benign coincidence that HACI and the Commission located all public housing projects within IPS boundaries? This court thinks not and specifically holds that the action of such official bodies in locating such projects within

IPS, as well as the opposition of the suburban governments to the location of public housing within their borders, were racially motivated with the invidious purpose to keep the blacks within pre-Uni-Gov Indianapolis and IPS, and to keep the territory of the added suburban defendants segregated for the use of whites only. The Court of Appeals has already agreed that the record shows a " 'purposeful, racially discriminatory use of state housing. . . .' " 541 F. 2d 1211, 1223.

The evidence clearly supports the foregoing findings. As the Court of Appeals for the Sixth Circuit has said:

> "A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively established that their action or inaction was a consistent and resolute application of racially neutral policies. *NAACP* v. *Lansing Board of Education,* 559 F. 2d 1042, 1046-47 (6th Cir., 1977) quoting *Oliver* v. *Michigan State Board of Education,* 508 F. 2d 178, 182 (6th Cir., 1974)."

In this case it was obvious that the natural, probable and foreseeable result of erecting public housing projects wholly within IPS territory would be to concentrate poor blacks in such projects and thus to increase or perpetuate public school segregation within IPS. The Deputy Mayor of Indianapolis testified that HACI never even examined sites outside the then City of Indianapolis (IPS territory). No consideration whatever was given to locating housing projects so as to reduce public school segregation, and then bring necessary municipal services to the project sites. When faced with the choice of locating a public housing project on the west side of Emerson Avenue (IPS territory) or across the street on the east side of such avenue (Warren Township territory), HACI chose the IPS side of the street. This deliberate choice was intended to, and did, perpetuate Warren Township as a segregated white community and IPS as a heavily black community.

The attitudes and motivation of the Metropolitan Development Commission have been the same. Its chief administrator testified that its demographic studies failed to take race into account in projections of population movement, or in considering the location of schools, and did not require housing developers in the suburbs to pledge a nondiscriminatory policy in either the sale or rental of property. This same Commission, after the filing of this suit, refused to permit the defendant School Board to relocate Crispus Attucks High School to a site at West 30th Street and Guion Road—a white neighborhood. The separation of the races, both in housing and in schools, has been an unspoken, but intentional policy of the Commission.

Certain of the added defendant suburban school corporations, joined by HACI, have attempted to avoid the foregoing facts, and the inferences naturally flowing therefrom, by arguing that HACI had no power to locate its housing projects outside the former City of Indianapolis (IPS territory), notwithstanding that the statute which enabled its creation, I. C. 8-7-11-1, et seq., provided from the date of its enactment in 1937 that the area of operation of a city includes the area of the city and the area within five miles of its territorial boundaries. I. C. 8-7-11-3(g)(1).

Added defendants refer to the United States Housing Act of 1937, and its requirement for cooperation agreements to be entered into by the public housing agency and the "governing body of the locality involved." 42 U. S. C. § 1415(7)(b)(i). They then contend that since no such agreements were executed between HACI and the Marion County Council, the building of housing units in the suburban townships was impossible.

The foregoing argument, in the opinion of this court, is sheer nonsense. The section of the Indiana statute in question was analyzed by the Indiana Supreme Court in *Edwards* v. *Housing Authority of Muncie*, 215 Ind. 330, 19 N. E. 2d 741 (1939). The holding was that:

> "Normally the county government has jurisdiction outside of the area of incorporated cities and towns in respect to certain matters, but the city has power to annex additional territory, which, for governmental purposes within the scope of the authority of the city, is removed from the jurisdiction of the county. It may have been the legislative intention that either a county or a city housing authority might assume jurisdiction to act in respect to territory outside of the area of cities, but adjacent thereto, and no doubt the authority which first undertakes to exercise jurisdiction acquires exclusive jurisdiction. . . ."

According to the evidence, HACI is the only housing authority ever established in Marion County to date, so there can be no question as to its power to have built its units in the unincorporated suburbs at any time. As to the section of Federal law quoted, "the locality involved" simply refers to the city, town, or county governmental unit which has established the housing authority—in this case the City of Indianapolis. Indianapolis did, of course, execute such a cooperation agreement. The statute has to do, *inter alia*, with the guarantee by the Federal Government of bonds issued by the local housing authority. Obviously, the cooperation desired is that of the governmental agency which chartered the housing authority—not that of some other unit (here the Marion County Council) which has no interest in the matter.

## VI. *Application of Dayton* v. *Brinkman*

In *Dayton Board of Education* v. *Brinkman*, ..... U. S. ....., 97 S. Ct. ....., 53 L. Ed. 2d 851 (1977), the Supreme Court vacated the judgment of the Court of Appeals for the Sixth Circuit, 539 F. 2d 1084 (1976), which had approved a district court desegregation plan for the Dayton schools. The plan involved districtwide racial distribution under which the racial distribution of each school would be brought within 15% of the black-white population ratio of Dayton.

The trial court had found a three-part "cumulative" constitutional violation by the Dayton School Board—the lack of any affirmative effort to achieve racial balance in its schools, the former use of optional attendance zones, and its rescinding of resolutions passed by a previous Board which had acknowledged segregative practices and called for remedial measures. The Supreme Court criticized each of such findings for various reasons, and held that in any event there was no justification for imposing a systemwide remedy without evidence proving constitutional violations having a systemwide impact. It therefore remanded with directions to take additional evidence and, if constitutional violations be found, to determine how much incremental segregative effect such violations had on the racial distribution of the Dayton school population as presently constituted, as compared to what it would have been in the absence of such constitutional violations.

Following *Dayton,* the Court of Appeals has directed this court to make the same determinations. The record shows that as of April 30, 1974, HACI owned 2,395 apartment units of various sizes, other than those held for rent exclusively to the elderly (R. 1975, pp. 164-173 incl.). Estimating three school age children per unit, it is apparent that more than 7,000 pupils would have been afforded a desegregated education in the schools of added defendants had the housing units been placed outside IPS. Further, the evidence is that the neighborhoods around housing projects tend to become integrated, so that others would have moved to the suburban housing areas. The total would approximate the number of students which this court proposes to transfer.

## VII. *The Legislative Remedy*

As set out in this court's entry for June 2, 1978, the General Assembly of Indiana has enacted a statute, I. C. 1971, 28-8.1-6.5-1, et seq., pursuant to which a court may order transfers of students from one school corporation to another as an aid

to desegregation. The Act requires three findings to be made in order to justify the transfers:

(1) A transferor corporation must have violated the equal protection clause of the fourteenth amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders;

(2) A unitary school system within the meaning of such amendment cannot be implemented within the boundaries of the transferor school corporation; and

(3) The fourteenth amendment compels the court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment.

The foregoing constitute all of the requirements for transfer (save exhaustion of appeals). There is no requirement whatever for *Arlington Heights* or *Washington* v. *Davis* analysis of the transferee corporation, nor that it have been guilty of any fourteenth amendment violation. The statute represents purely and simply a State enacted remedial measure, which the General Assembly had undoubted power to enact.

In its opinion of August 1, 1975 this court made the three required findings as the basis for its order to IPS to transfer, and to the suburban school corporations to receive certain numbers of black school children. Since such findings were not found unsupported by the evidence on appeal, they would seem to constitute the law of the case.

To eliminate any doubt, however, this court now states its findings anew, as follows:

(a) The defendant Board of School Commissioners of Indianapolis, Indiana (IPS) has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing de jure racial

segregation of the students within its borders. *United States* v. *Board of Sch. Com'rs, Indianapolis, Ind.*, 332 F. Supp. 655 (S. D. Ind. 1971), aff'd 474 F. 2d 81 (7 Cir. 1973), cert. den. 413 U. S. 920, 93 S. Ct. 3066, 37 L. Ed. 2d 1041 (1973).

(b) A unitary school system within the meaning of such amendment cannot be implemented within the boundaries of IPS. "In the long haul, it won't work." 332 F. Supp. 655, 678.

(c) The Fourteenth Amendment compels the court to order IPS to transfer a substantial number of its black students to various added defendant school corporations for education in order to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment.

The general transfer law of Indiana is quite liberal. It provides that a transfer may be made upon application by the parent of any child who resides in the transferor corporation "if it feels the child may be better accommodated in the public schools of another school corporation of this state or of an adjoining state. . . ." I. C. 1971, 20-8.1-6.1, et seq. Inasmuch as transfers have long been a part of the Indiana educational system, it is only natural that such a method was selected by the General Assembly as one method of assisting in bringing about desegregation in systems such as IPS. The use of such statute does not require the courts to consider Dayton-type rules, but only what is necessary to desegregated the transferor corporation.

## VIII. *Conclusions of Law*

Pursuant to the findings of fact herein it is concluded as a matter of law that his court's previous order and judgment of August 1, 1975 should in all things be reinstated, with that part thereof pertaining to the transfer of pupils revised so as to apply

to the school year 1978-79. Surplus IPS teachers should be hired, if required, by the transferee school corporation.

The court further concludes, based on its previous finding that the State has an affirmative duty to assist in desegregating IPS, that the defendant Superintendent of Public Instruction should forthwith develop a comprehensive in-service training program as described in *Bradley* v. *Milliken*, 402 F. Supp. 1096, 1139 (E. D. Mich. 1975), aff'd 540 F. 2d 229 (6 Cir. 1976), aff'd *sub nom Milliken* v. *Bradley*, ..... U. S. ....., 97 S. Ct. ....., 53 L. Ed. 2d 745 (1977). Such program shall be participated in by all teachers and staff of the transferee schools prior to and during the coming 1978-79 school year. Any and all expenses of developing and administering such program shall be paid by the State of Indiana.

The court further concludes that the limitations on the construction or renovation of public housing projects by HACI should be expanded to include any type of low-rent housing, as that term is defined and used in 42 U. S. C., Chapter 8, §§ 1401, et seq.

Orders will be entered in accordance herewith.

Dated this 11th day of July, 1978.

/s/ S. HUGH DILLIN,
S. Hugh Dillin,
*Judge*

UNITED STATES DISTRICT COURT

* * (Caption—IP 68-C-225) * *

## MEMORANDUM OF DECISION

### I.

This continuing action, filed May 31, 1968, is before the Court on its second 1978 remand from the Court of Appeals for the Seventh Circuit.

By the first remand, 573 F. 2d 400 (7 Cir. 1978), this Court was directed to determine whether or not certain acts passed by the General Assembly of Indiana in 1969 were enacted with a racially discriminatory intent or purpose. This Court was further directed to determine whether or not the action of the added defendant Housing Authority of the City of Indianapolis (HACI), as approved by the Metropolitan Development Commission of Marion County (MDC), in locating all of its public housing projects within the territory of the defendant Board of School Commissioners of the City of Indianapolis (IPS) was done with a racially discriminatory intent or purpose. If the answer to either of the foregoing was in the affirmative, this Court was further directed to consider the principles of *Dayton* v. *Brinkman,* 433 U. S. 406 (1977), in providing an interdistrict remedy.

This Court complied with the foregoing mandate by its Memorandum of Decision dated July 11, 1978, 456 F. Supp. 183, answering both questions in the affirmative, and estimating that some 7,000 black pupils might well have been afforded a desegregated education in suburban schools had the public housing units been located outside IPS. The Court then entered a judgment which ordered IPS to transfer, and certain added defendant school corporations within Marion County to receive, certain numbers of black pupils; other orders were entered as to other added defendants.

All defendants and added defendants appealed, but the Court of Appeals deferred consideration of the appeals and again remanded the action on motion of the defendant IPS "for the limited purpose of hearing and deciding upon modifications of the July 11 judgment in the nature of alternative remedy, plans and related evidence proffered by IPS (as well as any alternatives, objections, modifications, and rebuttal of any opposing parties) and hearing and making additional findings upon further evidence offered by any parties on the issue of which alternative remedy (including pupil reassignment, ancillary relief, and allocation of desegregation costs) is necessary and equitable to overcome the combined effect of all the constitutional violations previously found by the district court."

As stated, the limited remand was granted on motion of the defendant IPS, which came forward with an elaborate interdistrict desegregation plan (Plan C), prepared under the supervision of Gordon Foster, Ph.D., a professor in the School of Education at the University of Miami (Florida). This plan would mandate the exchange of some 52,000 pupils between IPS and the ten other school corporations in Marion County, requiring the busing of approximately 41,000 students. Each school in the county would end up with a student body approximately 27% black—the current percentage of black pupils in the county as a whole.

IPS also submitted Plan A, as required by the Court, which plan would implement this Court's previous order of July 11, 1978 directing the transfer of black IPS pupils to eight suburban school corporations in Marion County by identifying in Part I thereof geographic areas from which such pupils would be selected. Part II of such Plan A provides a plan for the final desegregation of IPS within its own boundaries following the implementation of Part I. IPS furthermore submitted Plan B, which would require the transfer from suburban schools to IPS of white students equal in numbers to those black students transferred to the suburbs under Plan A. The preference of IPS is

for the adoption of its Plan C. (Although all of Marion County, except certain cities and towns, is now a part of the City of Indianapolis under Uni-Gov, this memorandum will sometimes refer to the added defendant school corporations as "suburban schools.")

Pursuant to that part of the limited order of remand which permitted any party to submit an alternative plan of desegregation, the Metropolitan School Districts of Lawrence, Warren and Wayne Townships of Marion County (hereafter LWW) also submitted a partial plan of desegregation. By such plan, Warren and Wayne offer to accept the transfer from IPS of specified territory containing black students sufficient to raise the percentage of such students in their respective school systems to 7.5%. Such territory would be disannexed by IPS and annexed by Warren and Wayne, respectively, so as to become a part of their respective systems for all school purposes, including taxation and the right of voters residing in the annexed territories to vote in school board elections in the townships. They would also agree, along with the Metropolitan School District of Lawrence Township, to accept voluntary transfers of black pupils from IPS, and to permit voluntary transfers of their own white pupils into IPS. The Metropolitan School Districts of Decatur, Pike, and Washington Townships, and the Franklin Township Community School Corporation later joined in the LWW plan to the extent of agreeing to the transfer policy, with Pike and Washington likewise agreeing to annex a limited amount of IPS territory containing black students.

The United States of America, the original plaintiff herein, did not present a plan. However, in its posthearing memorandum, filed March 21, 1979, it suggested that the most appropriate remedy would be to require IPS to devise a plan to annex all or portions of the Marion County suburban school systems, leaving the extent of suburban involvement to IPS, in the first instance. Any annexation by IPS, the Government observes, would be subject under Indiana law to the right of

residents of the annexed areas to file a remonstrance action in state court. If such remonstrance be filed, the Government next suggests that "the propriety of such remonstrance action could be properly judged by this Court from the standpoint of whether the remonstrance interferes with the court-ordered desegregation plan. See *United States* v. *State of Texas,* 356 F. Supp. 469 (E. D. Texas, 1972)."

The intervening plaintiffs Buckley, representing the class consisting of all Negro children of school age attending segregated schools in IPS, took a position in favor of Plan A, and adduced evidence in support thereof.

The intervening plaintiff Indiana State Teachers Association did not present a plan for desegregation of the IPS schools. Such plaintiff did, however, make a number of suggestions relative to ancillary relief, and as to the relief of teachers who might be rendered surplus as the result of a desegregation order.

A hearing was had November 6-November 21, 1978 to take additional evidence on the foregoing matters. The parties were granted permission to file posthearing briefs, the last of which was filed March 21, 1979. An unusual feature of this most recent hearing was the role reversal on the part of the original defendant IPS. From the inception of the action, IPS has resisted efforts to desegregate its schools, including orders to transfer some of its pupils to suburban schools. Now, however, IPS demands that it be ordered to exchange its pupils with those of each of the suburban school districts so as to arrive at an exact racial balance in all of the schools in Marion County.

## II

Having considered all of the evidence in this case, the Court is of the opinion, and now finds that Plan A, with certain modifications as hereafter described, is best adapted to overcome the combined effect of the constitutional violations previously found by the Court. In this connection it must be remembered that the

Court's remedy can be designed to redress only the difference between present racial distribution and what it would have been in the absence of constitutional violations. *Dayton Board of Education* v. *Brinkman,* 433 U. S. 406, 97 S. Ct. 2766, 53 L. Ed. 2d 851 (1977); *United States* v. *Board of School Com'rs, Etc.,* 573 F. 2d 400, 410 at n. 22 (7 Cir. 1978).

In its opinion of July 11, 1978, *United States* v. *Board of Sch. Commissioners, Etc.,* 456 F. Supp. 183 (S. D. Ind. 1978), this Court found as follows:

> "The record shows that as of April 30, 1974, HACI owned 2395 apartment units of various sizes, other than those held for rent exclusively to the elderly . . . . Estimating three school age children per unit, it is apparent that more than 7,000 pupils would have been afforded a desegregated education in the schools of added defendants had the housing units been placed outside IPS. Further, the evidence is that the neighborhoods around housing projects tend to become integrated, so that others would have moved to the suburban housing areas. The total would approximate the number of students which this court proposes to transfer." 456 F. Supp. at 190.

The "number of students which this court proposes to transfer" was the number set in IPS Exhibit 99, Proposal A Revised, i.e., 6,533 students in grades 1-9 immediately, and an additional 726 per year, more or less, for the next three years, for an eventual total of 8,711.

Additional evidence adduced by IPS and by added defendants LWW indicate that the Court's above mentioned estimate of 7,000 black students directly affected by the HACI housing violation was somewhat high. IPS exhibit 98 reflects the increase of non-white students in the elementary schools serving ten of the eleven public housing projects following the completion of such projects in the late 1960s and early 1970s. By applying the percentage of non-white pupils at each school to the total enrollment immediately before completion of a project, and comparing the result to the number similarly obtained as to the same

school during the first or second year after completion (depending upon whether or not completion took place before or after the beginning of a school year), it appears that the number of additional non-white students attending the elementary schools from these ten projects within a year or two after their completion was approximately 2,500.

A school year typical of the years during which these projects were being completed is 1968-69, during which IPS had an enrollment of 98,363 in grades 1-12, of which 72,244 or 73.45% were elementary students. Applying the formula 2,500/73.45 $\times$ 100 = total students, grades 1-12, we arrive at a total of 3,404 public housing students residing in the ten projects. These projects contain 1,644 housing units, so that the average number of students per unit would be 2.07. This figure applied to the total of 2,395 units owned by HACI yields a grand total of 4,958 black students from all eleven housing units who would have received their education in a desegregated suburban school had all public housing been located outside IPS.

The foregoing revised estimate is corroborated to a remarkable degree by LWW exhibits 8 and 10. An actual count was made in July, 1978 of the children ages 6-18 residing in the same ten projects referred to in IPS exhibit 98, and is shown in LWW exhibit 10 to be 2,586. LWW exhibit 8 shows the vacancy percentage in the projects at about that time (specifically, on September 30, 1978) to have been 19.2%. The 2,586 children would therefore constitute those in residence at 80.8% of capacity, and application of the formula 2,586/80.8 $\times$ 100 = total school age children with units filled to capacity gives a result of 3,200. The correlation between this figure and the figure of 3,404 arrived at by the Court's first method speaks for itself.

IPS endeavored to show by its first two witnesses that there had been substantial additional constitutional housing violations by governmental agencies. The first witness was Martin E. Sloane, an attorney who is general counsel of an organization which specializes in suing federal, state and local agencies over

alleged failures to administer housing and urban development programs in a manner to achieve fair housing goals. He testified as to the location of various types of federally assisted housing within Marion County, and gave an opinion that such housing was located and occupied on a racially segregated basis, both inside and outside IPS. The Court finds that, with the obvious exception of the public housing projects, there is no factual basis in the record for such opinion.

To take an example, the witness testified that federally subsidized housing projects (apartments) constructed under Sections 221(d)(3) and 236 of the housing laws were constructed in areas which, in his opinion, were racially identifiable. Basically, his testimony is that all such projects built inside IPS were built in black residential areas and occupied for the most part by blacks, while all of those in the suburbs were built in white residential areas and occupied for the most part by whites. However, IPS exhibit 24 demonstrates that of the seven new Section 236 projects built inside IPS only three (Caravell Commons, Orchard Park, and Parkview) were built in black residential areas. Again, only two of the six new Section 221(d)(3) family projects built inside IPS were built in black residential areas (Riverside and Andrews Gardens).

It is true that thirteen out of sixteen Section 236 projects built in the suburbs were built in areas where the non-white population was zero in 1970, and was only 2%, 6% and 22% in the other three locations. It is also true that of the seventeen Section 221(d)(3) family housing projects built in the suburbs, fourteen were built in areas where the 1970 non-white population was zero, and the other three in areas where the applicable percentage was 2%, 2%, and 6%. There is, however, no evidence that such suburban construction by private builders was done with any intent to segregate; indeed, given the fact that the population of the suburbs at the time of the construction in question was overwhelmingly white, as shown by other exhibits,

it would have been difficult to place an apartment project in an area that was not virtually all white.

The fact is that the placement of federally subsidized housing projects in white suburban areas, so that members of minority races and economically deprived persons of whatever race may enjoy the amenities of such neighborhoods, has long been a goal of such organizations as that for which the witness acts as general counsel. In the Chicago area it has required years of litigation to secure such a result. *Hills* v. *Gautreaux*, 425 U. S. 284, 96 S. Ct. 1538, 47 L. Ed. 2d 792 (1976). In the case at hand, this Court has enjoined the defendant HACI from any further construction or subsidization of family housing units within the boundaries of IPS, with the obvious corollary that if there is to be any further construction of this type it will be in the suburbs. The testimony of the witness that it is discriminatory to put subsidized housing in a white suburban area is incredible.

That the view of *Gautreaux* and of this Court is correct is amply demonstrated by said IPS exhibit 24, which shows that a great many of the outside IPS projects built in white census tracts now have substantial numbers of black tenants, particularly in Pike, Washington, and Lawrence Townships, contrary to the testimony of the witness. This is shown by IPS exhibits 27, 28, and 29. This, of course, helps to account for the substantial increase in the number of black pupils in the schools of these three added defendants during the past few years.

The witness testified further that all Section 236 rehabilitation work had been performed within IPS on projects having a largely black occupancy. This is true. However, absent further evidence from which a racial bias could be inferred (and there is none), the only inference which the Court can draw from this fact is that the inner city contains older structures which are in greater need of rehabilitation than those in the suburbs.

The second witness gave evidence regarding the 1978 failure of the Uni-Gov City-County Council to authorize the location of

federally assisted scatter-site housing throughout Marion County, including the suburbs, and also gave evidence to the effect that HACI, in collaboration with state and federal agencies, may be attempting to evade the Court's injunction against the erection of additional subsidized family housing within IPS. This evidence may well lead to further proceedings against HACI, but is otherwise of little help in arriving at an appropriate remedy.

III

The other constitutional violation found by this Court to have had an interdistrict effect was the enactment of the Uni-Gov law, and its companion legislation. Such finding as to the effect of this legislation has been confirmed by the Court of Appeals. *United States* v. *Bd. of Sch. Com'rs of City of Indianapolis*, 541 F. 2d 1211, 1220 (7 Cir. 1976); *id.*, 573 F. 2d 400, 408 (7 Cir. 1978). However, under *Dayton* the Court is now required to assess the incremental effect of such legislation, which was enacted in 1969. This is impossible to do.

If Uni-Gov had changed existing school district lines, it would not be difficult to compute the number of school children of the two races on each side of the lines before and after the change. However, as Judge Tone points out in his dissent, 541 F. 2d 1211, 1227 at n. 7, failing to redraw school district lines is not the same as redrawing school district lines. IPS, in its new role as advocate of county-wide racial balancing, argues that but for Uni-Gov exclusion of school districts from its enlargement of the city of Indianapolis, the IPS boundaries would now be coterminous with those of the civil city. This would be true, if one assumes that Uni-Gov could have and would have been enacted sans those two provisions, but this Court has previously found that without them Uni-Gov would not have been enacted. 456 F. Supp. 183, 187.

Statistically, IPS exhibit 64 demonstrates that the number of black children in suburban schools has increased from 1,220 in school year 1968-69, the last year before Uni-Gov, to 4,392 in

the current year 1978-79—an increase of 360%. During the same period of time, the number of blacks in IPS schools has declined slightly, from 36,586 to 34,962. Had black families taken advantage of the Section 236 and Section 221(d)(3) existing housing situated in Decatur, Wayne, and Perry Townships, as shown on IPS exhibit 27, to the same extent that they have done in Pike, Lawrence, and Washington Townships, shown on the same exhibit, the number of black students in schools of the former townships would be substantially higher.

The Court surmises that the increase in the number of black families residing in the suburbs is more likely attributable to passage of the Fair Housing Act of 1968, 42 U. S. C. § 3601, et seq. than to the passage of Uni-Gov in 1969. However this may be, it remains that there are no facts in evidence from which the incremental effects of Uni-Gov may be determined in terms of numbers of students who were caused to move to or from IPS.

## IV

The greater part of the IPS testimony at the November 6 hearing was devoted to an effort to prove that the various acts of *de jure* segregation heretofore found to have been committed by the predecessors in office of the present members of its Board, such as manipulating boundaries, creating optional attendance zones, using temporary classrooms, erecting new buildings in one-race areas, etc., all within IPS, had an interdistrict effect sufficient to justify its proposed county-wide remedy. The cumulative testimony of various expert witnesses was adduced, all to the effect that each violation would tend to identify certain schools and neighborhoods inside IPS as black, and that this would cause whites to live in the suburban areas.

The Court rejects such sociological and psychological opinion testimony as being without foundation. None of such IPS witnesses relied upon any of the wealth of statistical data in evidence as furnishing a predicate for his testimony. Instead, the

Court is simply asked to "trust the experts," because they have previously testified to the same effect in many other desegregation cases. The Court is unable to do so, because it finds their conclusions to be illogical, as will be demonstrated.

The witnesses, of course, must begin with the assumption that many whites do not want their children to go to school with black children, or at least not with large numbers of black children. This assumption will be taken to be true. Now, assume that city school corporation X has a student population 40% black and, in the same county, adjoining suburban school corporation Y has a student population 1% black. Assume that the schools of X are desegregated, with the racial balance being approximately equal in the various schools. Under these circumstances the white family head with school children (W), having the racial bias assumed by the IPS witnesses, upon moving into the county for the first time would, as a matter of logic, always elect to locate in Y, other things being equal. Assume, on the other hand, that the schools of X are segregated, with many all-white schools. In these circumstances, W would logically decide to locate inside X, near one of such white schools, if he believed that the situation would remain the same for a substantial period of time. It may therefore be seen that segregation in X would be more likely to attract W to X, or to keep a white family from leaving X, than the reverse, as testified by the experts.

The truth of the foregoing exercise in logic may easily be demonstrated by the statistical evidence in the case. IPS exhibit 64 shows that before this action was filed, when IPS schools were substantially segregated, the 1968-69 enrollment of white pupils in IPS, grades K-12, was 72,025. Since the action was filed and the former all-white schools desegregated, white pupil population has dropped to 38,693, a catastrophic decrease of 33,332 white pupils or 46.3% of the 1968-69 number.

On the other hand, the school population of the ten suburban school corporations in Marion County in 1968-69, at which

time they were 98.3% white, was 70,749. White school population in IPS commenced to drop immediately after the filing of this action, but at the same time the number of pupils rose rapidly in the ten suburban school districts until this Court's decision of August 18, 1971, 332 F. Supp. 655, which suggested the necessity of involvement of the suburban schools. For the school year 1971-72, total enrollment in these schools was 77,125, an increase of 6,376 pupils, or 9% in only three years. But with the threat of a county-wide remedy, the total enrollment in these schools has declined to 70,883 for the current school year, a loss of 6,242 or 8.09%. The decrease in white students is even more pronounced, being from 75,025 to 66,491 —a decrease of 8,534 or 11.37%.

That these reductions in white pupils, first from IPS territory and then from the area of the ten Marion County suburban school districts, are attributable to the actuality (within IPS) or the likelihood (outside IPS) of desegregation, rather than to the nationally recognized phenomenon of a falling white birth rate may also be demonstrated by the record. In its decision of July 20, 1973, as corrected November 12, 1973, 368 F. Supp. 1191, aff'd in part, rev'd in part and remanded 503 F. 2d 68 (7 Cir. 1974) this Court adjudged thirteen additional added defendant school corporations, which adjoin but are outside Marion County, to be subject to participation in the desegregation of IPS. This part of the Court's judgment was reversed on the basis of *Milliken* v. *Bradley*, 418 U. S. 717, 94 S. Ct. 3112, 41 L. Ed. 2d 1069 (1974), thus freeing these virtually all-white school corporations from the possibility of being required to accept black students from Marion County.

These corporations actually abut eight of the ten Marion County suburban school corporations, and more than 60% of their residents are employed in Marion County. 368 F. Supp. 1191, 1206 and 1216. However, while the number of white students in the inside suburban corporations was declining by 11.37%, as above noted, the total school population of the out-

side suburbs rose from 39,779 in 1973-74 to 44,386 in the current school year, as shown on LWW exhibit 11, a total of 4,607 or 11.6% in the other direction.

In summary, it cannot be demonstrated that acts of *de jure* segregation practiced by one school corporation within its own boundaries have any significant effect upon school or residential populations in adjoining school corporations. In contrast, it appears that desegregation tends to cause white flight from school corporations which are or may be involved therein. The IPS experts are simply wrong, and have failed to furnish a basis for the adoption of Plan C.

## V

The LWW plan is rejected because, in the first place, it does not go far enough. Only the added defendants Warren and Wayne Metropolitan School Districts agree to accept any significant number of black students from IPS other than on a voluntary transfer basis. As to Warren and Wayne, such corporations only agree to annex territory of IPS sufficient to increase their black student enrollment to 7.5%; further, they specifically describe the territory which they would be willing to annex, so that any variation in either territory or numbers would enable them to withdraw consent.

To order annexation without consent, whether by Warren, Wayne, or any other defendant or added defendant, would raise a completely new set of legal questions at a very late date, and would foreseeably cause substantial added delays. However, the idea of annexation is good in theory, and IPS will be directed, in its preparation of a second revision of Plan A, to attempt to select black transfer students from areas which are contiguous to the receiving school corporation, if that may be done consistent with other relevant criteria. To the extent that this may be done, it is apparent that IPS and the receiving school corporations may then enter into voluntary annexation programs, if they desire to do so, agreeable to Indiana law. Burns Ind.

Stat. Ann., Code Ed., §§ 20-3-14-1, et seq. It may even be possible under existing Indiana law to annex noncontiguous territory by consent; if not, a simple act of the legislature could make it possible to do so.

The United States has also, at the eleventh hour, suggested annexation. Its reverse annexation idea is for IPS to annex all or part of the territory of the suburban school corporations. With its usual ambivalence, it first states that such an attempted annexation would be subject to remonstrance, but then suggests that this Court could divest the state court of jurisdiction of the remonstrance proceeding and, in effect, quash it if unhappy with its progress. For the same reason given in the first sentence of the preceding paragraph, the Court declines to consider this suggestion.

## VI

IPS Plan B is rejected because this Court has already found that it has no power to order that a suburban child be transported out of its own school corporation so long as the suburban school corporations remain as separate legal entities, because there is no evidence that any of them has operated anything other than a unitary school system. *United States* v. *Board of Sch. Com'rs of Indianapolis, Ind.*, 368 F. Supp. 1191, 1208 (S. D. Ind. 1973), rev'd in part on other grounds and remanded, 503 F. 2d 68 (7 Cir. 1974). In any event, the Court finds that the effect of Plan B would be to double the number of students required to be bused under Part I of Plan A, without any corresponding benefit to any party to this action, or to any person.

The basis for Plan B is simply that IPS characterizes Part I of Plan A as "one-way busing," and takes the position that this is inequitable because it places the "burden of desegregation" on blacks. IPS witness Dr. Green testified in opposition to Plan A at great length under an offer to prove to the effect that (1) black children are handicapped by receiving an inferior education in segregated schools, but are being required to "pay a

second price" when asked to go into white communities, and (2) when white children are bused into previously all black areas, white parents and school administrators become concerned about "quality education," and the schools are improved.

Dr. Green's dialectic as regards his argument (1) contains an obvious non sequitur. His second reason is based upon an assumption that IPS schools presently serving a high percentage of black students are inferior to other schools in the IPS system in terms of program, facilities, and staff. In addition to the fact that there has never been an issue presented in this case on such point, the further fact that faculty and staff have been desegregated for almost ten years, and that the programs in all of the schools are identical, save for some special new pilot programs in the elementary schools and the new "magnet" programs in certain high schools, the witness has entirely overlooked Part II of Plan A. Part II, which works with Part I as part of an overall plan to desegregate finally each identifiable black school remaining in the IPS system, calls for the transfer of a substantial number of white students residing within IPS into schools which are substantially all black. In fact, Part II considered alone, as presently written, would transport more white students than black students. This, of course, meets Dr. Green's point two, even assuming it to be valid. As to facilities, IPS compliance with Plan A, Part I will afford it the opportunity to discontinue obsolete school buildings.

As stated by this Court in the previous opinion just cited, *supra,* the Supreme Court has not addressed itself specifically to the constitutionality of one-way busing (more accurately, one-race busing), but in *McDaniel* v. *Barresi,* 402 U. S. 39, 91 S. Ct. 1287, 28 L. Ed 2d 582 (1971), approved a plan which did just that. However, Plan A, considered as a whole, is not such a plan because it calls for the busing of many students of both races.

It is true that in Part I only, it is black students who are being bused to suburban schools from IPS, and no white students

are being bused back into IPS. But the students who will be the classmates of such IPS transferees are themselves bused to school, for the most part. As shown in Figure 8, attached to this Court's opinion of July 20, 1973, 368 F. Supp. 1191, 1218, all of the suburban schools with the exception of Speedway bus a great majority of their pupils, ranging from 62.34% in Beech Grove to 90.71% in Warren Township and 91.45% in Decatur Township. The suburban schools are not neghborhood schools but drive-in schools, and his Court fails to see why it is more of a "burden" for a black child to ride in comfort to such a school than for a white child to do so. As was said in *Higgins* v. *Board of Education of City of Grand Rapids,* 508 F. 2d 779 (6 Cir. 1974), in affirming a voluntary plan which employed, among other things, the one-way busing of blacks from the inner city to certain outlying schools, all within the one school corporation of Grand Rapids, ". . . [I]t is only natural that a program of bussing for desegregation purposes will affect those in the compacted inner-city more than those in the suburbs. The latter are . . . more likely to have been bussed already for simple transportation reasons."

*Hart* v. *Community School Bd. of Ed., N. Y. Sch. Dist. #21,* 512 F. 2d 37 (2 Cir. 1975), affirmed an order of the district court directing that Mark Twain Junior High School, a segregated black school, be converted into a magnet school and that its students, as well as students of certain predominately white schools, be bused to other middle schools. The plaintiff class of black children attending Mark Twain appealed on the basis that the solution was unconstitutional in that it would bus 1,050 minority students as opposed to 650 white students. The Court found that "the 'burden' of busing cast upon minority students is only a 'somewhat heavier burden' . . . A 'somewhat heavier burden' as to fall somewhere, either on white or minority students as a class." The difference in numbers was not deemed significant.

This Court does not consider that riding a reasonable distance to and from school in a bus with children from one's neighborhood imposes any burden upon the child thus transported. Certainly no physical burden is imposed, and no mental burden would seem to be involved except to the extent that it might be suggested or induced by the parent—a matter which no court can control. In inclement weather, busing clearly confers a benefit to health, comfort, and safety. In any event, there will be little difference between the number of white children bused to school and the number of black children bused to school under Plan A, when the plan is considered as a whole.

Finally, the remedy ordered by this Court, now referred to as Plan A, has already been considered by the Court of Appeals for the Seventh Circuit and approved. *United States* v. *Bd. of Sch. Com'rs of City of Indianapolis,* 541 F. 2d 1211 (7 Cir. 1976). Although this holding was subsequently vacated and remanded, 429 U. S. 1068, 97 S. Ct. 800, 50 L. Ed. 2d 786 (1977), the remand to the Court of Appeals was solely for further consideration in the light of *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U. S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977), and *Washington* v. *Davis,* 426 U. S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976). These cases involve the issue of racially discriminatory intent or purpose. Since the attention of the Court of Appeals was not directed to *Milliken* v. *Bradley, supra,* there is no indication that the Supreme Court entertained reservations regarding the propriety of the interdistrict remedy ordered by this Court.

## VII.

This Court has herein found the number of black pupils directly affected by the HACI housing programs to be 4,958. This does not mean that the Court is limited to this number of interdistrict transfers, inasmuch as the Court has also found that when black occupied public housing projects are built in formerly white residential areas, there tends to be some movement

by blacks into private housing in the areas. 456 F. Supp. 183 at 190. LWW exhibits 7 and 7A illustrate such finding. Although the direct effect of the other constitutional violations found by the Court cannot be demonstrated statistically, it is reasonable to infer a moderate indirect effect. The Court's estimate is that the total number of black children affected by all violations, both directly and indirectly, that is, the number who would more likely than not be living in a suburb and attending a desegregated suburban school but for such violations, is from 8,000 to 8,500 children.

The number of black school children to be transferred to each of the eight transferee school corporations, as previously ordered by the Court on August 1, 1975, which order was reinstated and confirmed after remand on July 11, 1978, shall remain the same, with one exception. There is a substantial demographic change in the Metropolitan School District of Lawrence Township, in which the percentage of black pupils in grades 1-9 has now reached approximately 9%, as shown on LWW exhibit 4. Therefore, the Court finds that the number of black pupils to be transferred to said added defendants should be reduced from 930 to 443. With respect to the remaining school corporations designated to receive transfers, the changes in school populations which have occurred since the 1974-75 school year are not of sufficient significance to warrant any change.

With respect to added defendants Metropolitan School District of Pike Township and Metropolitan School District of Washington Township, it is noted that continuing demographic change in such districts has resulted in an increase in their percentage of black students to 19.28% and 19.01%, respectively. IPS exhibit 64. This being true, the Court finds that neither of them should be involved in the remedy in this action, and that the action should now be dismissed as to each of them. In this connection, even Dr. Foster, the author of IPS Plan C, testified that it was not necessary to involve either of these two school corporations in order to put his plan into effect, and that to transport approxi-

mately the same number of black students into and out of such corporations "would not make much sense."

The IPS director of planning testified as to the matters taken into consideration, and the methods by which Plan A was put together. Although the result appears to be generally workable, the evidence is that somewhat more children are required to be bused than would be true if another method had been used. This result obtains from the fact that Part I was developed before Part II, and the fact that IPS required that its four area high school attendance concept be rigidly followed.

All of the witnesses who testified on the subject agreed that there was no educational advantage in the four area concept, and that it made the preparation of desegregation plans more difficult. Indeed, the testimony is that no other school in the United States establishes its feeder patterns by starting with the high schools and working down, as does the four area system, rather than by starting with the elementary schools and working up. This would be none of the Court's business if the only result was administrative awkwardness, but when the four area plan makes it necessary to divide neighborhoods which would normally be sending children to the same school, and requires the busing of children who would otherwise be walking, thus erecting additional obstacles to the drawing of a reasonable desegregation plan, then it does become the business of the Court. In accomplishing its further revision of Plan A, IPS will be directed to ignore and abolish its present high school area lines. After new attendance zones, and pairing and clustering patterns, as needed, are established for the elementary and upper elementary schools —in that order—IPS will, of course, be free to set up such high school attendance areas as it deems appropriate, so long as elementary and upper elementary assignments are not affected.

Another harmful impact of the four area plan is that it would require the separation of some existing pairs, clusters, and rezoned elementary attendance areas which have worked well since establishment of the interim plan in 1973. That plan has now

been in effect for almost six school years, and the great majority of the elementary schools affected by it have relatively stable black-white enrollments. Obviously, schools which are presently desegregated and stable should not be disturbed unless absolutely necessary to accomplish the desegregation of a presently identifiable black school—a concept with which IPS experts agree.

Therefore, IPS is directed to make and propose a second revision of Plan A, which will first look to desegregating as many as possible of the elementary schools presently having an enrollment more than 60% black by use of the techniques of changing attendance boundaries, pairing, and clustering without the use of bus transportation. After this has been accomplished, IPS may proceed with Part I (the outside transfer plan) and Part II (transfers inside IPS), as a unified plan, giving appropriate weight to such factors as maintaining existing patterns which are both desegregated and stable, the proximity of areas from which children are to be transferred to suburban schools to the borders of such transferee school corporations, neighborhood patterns in areas from which students are to be transferred, the time and distance involved in transportation of pupils, and obsolete school buildings in which programs may be discontinued. Such revised plan shall be submitted within ten days from the date hereof.

## VIII

In response to the order of this Court of July 11, 1978, the defendant Superintendent of Public Instruction developed an in-service training program, which has been the subject of criticism by added suburban defendants, as well as by certain of the IPS and Government witnesses. At the request of the Court, the witness Dr. Herman R. Goldberg Associate Commissioner for State and Local Educational Programs, United States Office of Education, submitted a posttrial memorandum expressing comments on the Superintendent's plan, and on an-

cillary programs in general. The Court now adds this memorandum to the record, marked 'Court's Exhibit 1." A similar critique by Dr. Robert L. Green, Dean of the College of Urban Development, Michigan State University, appears in the record as IPS exhibit 125. Another view of an appropriate in-service training program is set out as exhibit A to the posthearing brief of Indiana State Teachers Association. It is suggested that all of the ideas contained in these documents be considered in arriving at the final plan herein ordered.

All educator witnesses agree that various forms of ancillary relief must be granted if the desegregation plan is to function with any degree of efficiency. Those which appear from the evidence to be necessary in conjunction with Plan A, and therefore required, are set out immediately hereafter, largely in the words of, or paraphrasing Judge De Mascio in *Bradley* v. *Milliken,* 402 F. Supp. 1096, 1139-1145 (E. D. Mich. 1975), aff'd 540 F. 2d 229 (6 Cir. 1976), aff'd *sub nom Milliken* v. *Bradley,* 433 U. S. 267, 97 S. Ct. 2749, 53 L. Ed. 2d 745.

(1) *In-Service Training:* A comprehensive in-service training program is essential to a system undergoing desegregation. All participants in the desegregation process must be prepared to deal with new experiences that inevitably arise. By "all participants" is meant not only teachers and administrators, but also bus drivers, office personnel, and other employees of the school corporation. Such fields as student expectations, teacher expectations, minority culture, human relations, testing of minority students, the student code of conduct and the administration of discipline shall be included. The program shall also include an explanation of the school desegregation cases, beginning with *Brown* v. *Board of Education,* 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), and shall include a summary of the published decisions in this case, giving particular attention to the history of segregation in Indiana and in IPS, as set out in sections III-V of this Court's first opinion in this case, 332 F. Supp. 665.

It is known that the attitudes of teachers and other school personnel toward students may be affected by desegregation. These attitudes play a critical part in the atmosphere of a school and affect the pulse of the school system. Teachers, both white and black, often have erroneous expectations of the ability and worth of students of the opposite race, or from different socio-economic groups. These expectations must, through training, be reoriented to insure that academic achievement of black students in the desegregation process is not impeded.

The in-service training program as instituted should be on-going, conducted during the school year and just prior to the opening of school.

(2) *Testing and Curriculm Development:* Of great importance to children undergoing desegregation is the assurance that tests administered to them are free from racial, ethnic and cultural bias. As a result of biased testing procedures, black children might find themselves segregated in classrooms for slow learners, which would thereafter impede their educational growth. Therefore, all involved school corporations, in cooperation with the State Superintendent, should review their testing programs and make such changes as may be required, if any, to insure that testing design, content and procedures are adapted to a desegregated school system.

Similarly, the curriculum should be reviewed, having in mind the necessity to present materials free from cultural bias. History courses, for example, which ignore the contribution of racial and ethnic groups are antithetical to the successful implementation of a viable desegregation plan. Therefore, all schools should assess their curricular offerings for evidence of cultural bias. If present, the bias should be replaced by instruction which is in keeping with the goal of cultural pluralism.

The foregoing does not mean that the various school corporations will lose local control with respect to testing and curriculum development, but simply that they will conduct ongoing,

systematic evaluations of the same in order to carry out the foregoing purposes.

(3) *Student Rights and Responsibilities:* It is assumed that all of the involved school corporations presently have written codes of student conduct. If not, such should be prepared forthwith. Such codes should not only set out conduct which is proscribed, but should also afford the student minimal rights of due process, consistent with *Goss* v. *Lopez,* 419 U. S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975). All students and staff members must be made aware of both aspects of the code. The code should, on the one hand, assure that disruptions in the school or classroom will be dealt with in every instance, and on the other hand protect the students against arbitrary and discriminatory exclusions, suspensions, or expulsions.

(4) *Counseling and Career Guidance:* School desegregation may place psychological pressures upon the students affected, particularly upon those going from a segregated, majority black school to a desegregated school. Because of their training in conflict resolution, school counselors and guidance personnel should provide special leadership to ease the process of desegregation. It may be necessary to involve guidance counselors in a further intensive training program, or to hire additional personnel, in order to meet the needs of filing leadership roles in working with administrators, faculty, staff, parents and students.

Care must be taken to avoid the banishing of minority students to programs of study or occupational goals that are less demanding than their talents—present or potential—would indicate.

(5) *Reading and Communication Skills:* It is obvious that the development of proficient reading skills is the most essential educational service a school system can deliver. Likewise of great importance is the ability to communicate verbally in readily understood English. Although the preliminary projection of desegregation costs made by IPS included a large sum for

remedial teaching programs in such areas, there was no substantial evidence as to the necessity therefor. However, an initial assessment should be undertaken upon the transfer of pupils to determine what precise skills necessary for student success might be missing, if any. To the extent required, remedial programs should be undertaken.

(6) *School-Community Relations (Parental Involvement):* A detailed plan for a community relations program should be developed, which should include provisions for school-community liaison and parental involvement. To achieve maximum community participation the program should depend upon parental support; participants should be selected voluntarily and serve without compensation. An effective community relations program must develop a partnership between the community and the schools and must cooperate with traditional groups such as parent-teacher organizations. Parents of black children transferred to suburban schools should be advised of their eligibility for membership in the parent-teacher organizations of such schools.

There should be a cooperative flow of information from the schools to the community and from the community to the schools. Open and free discussion and participation in the desegregation process should be encouraged. The school-community relations organization should receive complete encouragement, budgetary support, direct assistance and a free flow of information from school authorities.

(7) *Monitoring:* The Court's order will provide for a Court-created monitoring system to audit efforts made to implement the Court's desegregation orders. The monitoring system created by the Court will provide for broad citizen participation. The monitoring group will reflect the racial and ethnic composition of the involved school corporations so that input may be received from a broad spectrum of the population.

Because it is the Court's constitutional obligation to audit efforts to implement its orders, the monitoring commission shall

report directly to the Court. The parties may, for the Court's consideration, nominate citizens for appointment to the monitoring commission. The Court is of the view, however, that the State, to whom the Fourteenth Amendment is addressed, has an equal obligation to oversee the efforts put forth and results achieved through implementation of the desegregation order. Accordingly, the Court will order the State Superintendent of Public Instruction to seek the assistance of available state institutions to provide the supervisory and expert support staff needed to analyze and report the information thus obtained.

## IX

*Procedure and Funding:* In developing the foregoing guidelines, it is not the intent of this Court to usurp the administrative authority of the school board of any of the involved nine school corporations, or of the State Superintendent of Public Instruction. Neither has this Court intended to substitute its authority for the authority of elected state and local officials to decide which educational components are beneficial to the various school communities.

It is the desire of the Court that the parties work together with the State Superintendent of Public Instruction to implement the various goals and programs above set out, and they are directed to do so. The State Superintendent shall be responsible for submitting a complete program for the Court's approval within thirty days of the date of this order, and the various school corporations are directed to send their superintendents or superintendents' designees to meet with the State Superintendent at such times as he may find necessary. In this connection, the Court observes that IPS has already had a great deal of experience and success in developing and implementing programs similar to the above in connection with the 1973 interim desegregation plan, and that the superintendents of some of the suburban school corporations who testified at the last hearing appear to have a great deal of expertise in this field. Such

facts suggest that the Court's deadline may easily be met and probably surpassed.

Further, the suburban schools were directed to commence in-service training by the Court's order of July 11, 1978, which order has never been stayed. Therefore, pending the development of a final program as herein ordered, the suburban schools should commence or continue their present programs without further delay.

All involved school corporations and the State Superintendent of Public Instruction are directed to proceed forthwith to make application for all federal funds available and reasonably required to carry out the ancillary relief above ordered; funds for programs of this kind are available through the Emergency School Aid Act and Title IV of the Civil Rights Act, to name two possible sources.

To the extent that federal funds are insufficient to defray all costs of ancillary relief, if at all, the balance shall be paid by the defendant State of Indiana out of funds otherwise unappropriated. *Milliken* v. *Bradley*, 433 U. S. 267, 97 S. Ct. 2749, 53 L. Ed. 2d 745. Provided, however, that if any of the suburban schools or IPS shall fail and neglect to make prompt application for federal funds, or to follow its application with all due diligence, then such school corporation shall not be entitled to reimbursement by the State for its costs incurred in connection with such programs. It shall be the duty of the defendant State Superintendent of Public Instruction and the defendant Governor of the State of Indiana to make the necessary arrangements for the payment of said costs, if required.

An order will issue later regarding responsibility for the cost of the school buses required to implement Plan A, following hearing on the claim for relief of IPS against the State Board of Tax Commissioners.

X

It is recognized that implementation of Plan A will render surplus some IPS teachers. On the other hand, the suburban

schools will be in need of additional teachers. Such schools should not attempt to accommodate transferred students merely by increasing class sizes, as to do so would work a hardship upon all of its students, as well as its present teachers, and would enable the suburban schools to collect windfall profits in their tuition charges.

As a matter of fundamental fairness, IPS surplus teachers should have the first opportunity to be hired by the suburban schools. This fact has been recognized by the suburban school corporations which adopted the LWW plan. The Court therefore adopts, and makes a part of its order, a composite of the LWW plan and the plan of the added plaintiff Indiana State Teachers Association as follows:

A. *Selection of Surplus IPS Teachers:* IPS will determine the number of teachers who must be declared surplus as a result of the transfer of students to other school corporations. IPS is instructed to consider its normal staff turnover and attrition in determining this number.

IPS is instructed to attempt to meet this number by first seeking volunteers for transfer to other school corporations from the IPS faculty at large. If the number of volunteers is not sufficient, IPS is instructed to release teachers by seniority within IPS, within the definition of seniority contained in Article X, Section 11 of the Agreement between IPS and the Indianapolis Education Association (ISTA exhibit 14, p. 44), subject to any requirements imposed by Indiana statute, and subject to the requirement that the percentage of black teachers released may not exceed the percentage of black teachers throughout IPS.

Volunteers and persons selected by seniority shall constitute an "available pool" of surplus IPS teachers. The available pool will not include any person whom IPS has determined not to rehire for reasons other than a reduction of staff.

B. *Hiring of IPS Teachers by Other Corporations:* In acquiring additional teaching personnel for the three school years

commencing with the year 1979-80, each transferee school corporation is required to make offers to qualified persons from the available pool before offering such employment to others, making offers to black teachers in the pool in no less proportion than their representation in the pool. Each transferee school corporation shall publicize the existence of employment opportunities on its staff to each member of the available pool who holds an appropriate license or certificate. Employment shall first be offered to persons who volunteered for the pool, then to persons who were involuntarily selected.

C. *Conditions of Employment:*

1. Salary and other conditions of employment will be those applying to all teachers within the transferee school corporation.

2. Persons employed from the pool are entitled to the same status as nonpermanent, semipermanent, or permanent teachers in the transferee school corporation as they would have held in IPS (I. C. 20-6.1-4-14; I. C. 20-6.1-4-9.5; I. C. 20-6.1-4.9), and are entitled to the same number of years credit toward semipermanent or permanent status in the transferee school corporation as they would have held in IPS. Years of employment in IPS and in the transferee corporations will be treated as consecutive years of employment in the transferee school corporation for all purposes.

3. Once a teacher has been offered a teaching job in any transferee school corporation and has taken or declined the same, the teacher shall no longer be a part of the available pool.

## XI

The attorneys for the prevailing parties, the intervening plaintiffs Buckley, are entitled to attorneys fees herein, but the fixing of such fees must necessarily be deferred until any appeals are finally concluded.

An appropriate order and judgment will be issued in accordance herewith.

Dated this 24th day of April, 1979.

/s/ S. HUGH DILLIN
S. Hugh Dillin,
*Judge*

UNITED STATES DISTRICT COURT

* * (Caption—IP 68-C-225) * *

July 9, 1979

JUDGMENT

The court having on April 24, 1979 filed a memorandum of decision in the above entitled action (Indianapolis VI), containing various findings requiring orders and judgments, such orders and judgments are hereinafter set out.

Recognizing that some or all of the parties to this proceeding may wish to appeal the judgments entered herein by this court as to them, and as a convenience to all parties, this court will designate by separate subnumber that particular judgment directed against each particular defendant or defendants, in order that the parties appealing may properly designate in any notice of appeal filed herein that particular judgment or judgments so appealed. The defendant The Board of School Commissioners of the City of Indianapolis, Indiana will be referred to as "IPS." The matter of transfer of pupils will be accomplished and continued in accordance with the applicable provisions of this court's Memorandum of Decision (Indianapolis IV), entered August 1, 1975, its Memorandum of Decision (Indianapolis V), entered July 11, 1978, and its Memorandum of Decision (Indianapolis VI), entered April 24, 1979, all of which provisions are incorporated in each subparagraph as if set forth herein. The plan of IPS entitled Plan A, Part I (Second Revision), as filed May 11, 1979, is adopted as the plan for supplying the geographic areas within IPS from which black students will be transferred, as more particularly hereafter set out.

a. IP 68-C-225A. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Decatur Township, Marion County, Indiana approximately 576 Negro students to be enrolled in grades 1-9 for the 1979-80

school year, and to make continuing transfers of such students for ensuing school years, until further order of the court. Such students will be all of those Negro students in grades 1-9 residing within the area designated as Transfer Area A, the description and map attached to and forming a part hereof. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly.

b. IP 68-C-225B. It is ordered and adjudged that IPS is directed to transfer to The Franklin Township Community School Corporation, Marion County, Indiana, approximately 346 Negro students to be enrolled in grades 1-9 for the 1979-80 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the court. Such students will be all of those Negro students in grades 1-9 residing within the area designated as Transfer Area B, the description and map attached to and forming a part hereof. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly.

c. IP 68-C-225C. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Lawrence Township, Marion County, Indiana, approximately 447 Negro students to be enrolled in grades 1-9 for the 1979-80 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the court. Such students will be all of those Negro students in grades 1-9 residing within the area designated as Transfer Area C, the description and map attached to and forming a part hereof. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly.

d. IP 68-C-225D. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Perry Township, Marion County, Indiana, approximately 1,560 Negro students to be enrolled in grades 1-9 for the 1979-80 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the court.

Such students will be all of those Negro students in grades 1-9 residing within the area designated as Transfer Area D, the description and map attached to and forming a part hereof. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly.

e. IP 68-C-225E. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Warren Township, Marion County, Indiana, approximately 1,213 Negro students to be enrolled in grades 1-9 for the 1979-80 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the court. Such students will be all of those Negro students in grades 1-9 residing within the area designated as Transfer Area E, the description and map attached to and forming a part hereof. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly.

f. IP 68-C-225F. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Wayne Township, Marion County, Indiana, approximately 1,409 Negro students to be enrolled in grades 1-9 for the 1979-80 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the court. Such students will be all of those Negro students in grades 1-9 residing within the area designated as Transfer Area F, the description and map attached to and forming a part hereof. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly.

g. IP 68-C-225G. It is ordered and adjudged that IPS is directed to transfer to the School City of Beech Grove, Marion County, Indiana, approximately 335 Negro students to be enrolled in grades 1-9 for the 1979-80 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the court. Such students will be all of those Negro students in grades 1-9 residing within the area designated as Transfer Area G, the description and map at-

tached to and forming a part hereof. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly.

h. IP 68-C-225H. It is ordered and adjudged that IPS is directed to transfer to the School Town of Speedway, Marion County, Indiana, approximately 239 Negro students to be enrolled in grades 1-9 for the 1979-80 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the court. Such students will be all of those Negro students in grades 1-9 residing within the area designated as Transfer Area H, the description and map attached to and forming a part hereof. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly.

i. IP 68-C-225I. IPS teachers rendered surplus as a result of the above orders shall be entitled to be hired by the transferee corporations, as vacancies occur, according to the following plan:

A. *Selection of Surplus IPS Teachers:* IPS will determine the number of teachers who must be declared surplus as a result of the transfer of students to other school corporations. IPS is instructed to consider its normal staff turnover and attrition in determining this number.

IPS is instructed to attempt to meet this number by first seeking volunteers for transfer to other school corporations from the IPS faculty at large. If the number of volunteers is not sufficient, IPS is instructed to release teachers by seniority within IPS, within the definition of seniority contained in Article X, Section 11 of the Agreement between IPS and the Indianapolis Education Association (ISTA exhibit 14, p. 44), subject to any requirements imposed by Indiana statute, and subject to the requirement that the percentage of black teachers released may not exceed the percentage of black teachers throughout IPS.

Volunteers and persons selected by seniority shall constitute an "available pool" of surplus IPS teachers. The available pool

will not include any person whom IPS has determined not to rehire for reasons other than a reduction of staff.

B. *Hiring of IPS Teachers by Other Corporations:* In acquiring additional teaching personnel for the three school years commencing with the year 1979-80, each transferee school corporation is required to make offers to qualified persons from the available pool before offering such employment to others, making offers to black teachers in the pool in no less proportion than their representation in the pool. Each transferee school corporation shall publicize the existence of employment opportunities on its staff to each member of the available pool who holds an appropriate license or certificate. Employment shall first be offered to persons who volunteered for the pool, then to persons who were involuntarily selected.

C. *Conditions of Employment:*

1. Salary and other conditions of employment will be those applying to all teachers within the transferee school corporation.

2. Persons employed from the pool are entitled to the same status as nonpermanent, semipermanent, or permanent teachers in the transferee school corporation as they would have held in IPS (I. C. 20-6.1-4-14; I. C. 20-6.1-4-9.5; I. C. 20-6.1-4-9), and are entitled to the same number of years credit toward semipermanent or permanent status in the transferee school corporation as they would have held in IPS. Years of employment in IPS and in the transferee corporations will be treated as consecutive years of employment in the transferee school corporation for all purposes.

3. Once a teacher has been offered a teaching job in any transferee school corporation and has taken or declined the same, the teacher shall no longer be a part of the available pool.

j. IP 68-C-225J. The transferee school corporations hereinabove named are ordered to adopt and administer the In-Service Training Program filed herein by the Department of Public

Instruction of the State of Indiana on June 8, 1979, as the same may from time to time be modified, as an on-going program, and conduct the same during the school year and just prior to the opening of school.

k. IP 68-C-225K. The cost of developing and administering said In-Service Training Program shall be paid by the State of Indiana.

l. IP 68-C-225L. It is considered and adjudged that plaintiff, intervening plaintiffs, and the cross-complainant IPS take nothing as to the added defendants The Metropolitan School District of Pike Township, Marion County, Indiana, and The Metropolitan School District of Washington Township, Marion County, Indiana, and this action is now dismissed as to each of them.

The court retains continuing jurisdiction of this action, and the parties thereto, together with the right to modify or supplement any orders or judgments herein or heretofore made.

Dated this 9th day of July, 1979.

/s/ S. HUGH DILLIN
S. Hugh Dillin,
*Judge*

OPINION BY CHIEF JUDGE FAIRCHILD

JUDGE TONE DISSENTING

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

April 29, 1980

Before

Hon. Thomas E. Fairchild, *Chief Judge*

Hon. Luther M. Swygert, *Circuit Judge*

Hon. Philip W. Tone, *Circuit Judge*

Nos. 78-1800, 78-1871, 78-1996 through 78-2006, 78-2039, 78-2221, 79-1831 through 79-1838, 79-1874 and 79-1875

United States of America,
*Plaintiff-Appellee,*

Donny Brurell Buckley and Alycia Marquese Buckley, etc.,
*Intervening Plaintiffs-Appellees,*

*vs.*

The Board of School Commissioners of the City of Indianapolis, Indiana, et al.,
*Defendants-Appellants,*

The Metropolitan School District of Perry Township, Marion County, Indiana et al.,
*Added Defendants-Appellants.*

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. IP 68-C-225

S. Hugh Dillin, Judge.

These causes came on to be heard on the transcript of the records from the United States District Court for the Southern District of Indiana, Indianapolis Division, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments entered against the School City of Beech Grove and the School Town of Speedway are VACATED and REMANDED for further consideration. In all other respects the judgments appealed from are AFFIRMED. Each party to bear its own costs on appeal. The above is in accordance with the opinion of this court filed this date.

INDIANA ACTS 1961, Ch. 186, pp. 431-442.

CHAPTER 186.

[H. 206. Approved March 8, 1961.]

AN ACT concerning school corporations.

*Be it enacted by the General Assembly of the State of Indiana:*

SECTION 1. As used in this act, the following terms shall have the following meanings:

(a) "School corporation" shall be any public school corporation of the state located in whole or in part in a county containing a civil city of the first class.

(b) "School city" shall refer to any school corporation which at any time is a school city or school town or has succeeded to jurisdiction of all or the major part in area of a school city or school town.

(c) "Civil city" shall refer to any civil city or civil town, the area of which, or the major portion of the area of which, is under the jurisdiction of a school city.

(d) "Annex," "annexing," "annexation" and "school annexation" shall refer to any action whereby the boundaries of any school corporation are changed so that additional territory, constituting all or a part of any one or more other school corporations, is transferred to it.

(e) "Civil annexation" shall refer to any action whereby the civil boundaries of any civil city are extended.

(f) "Acquiring school corporation" shall be the school corporation which acquires territory as a result of annexation.

(g) "Losing school corporation" shall be any school corporation which loses territory to an acquiring school corporation by annexation.

(h) "Annexed territory" shall be the territory acquired by an acquiring school corporation as a result of annexation from a losing school corporation.

(i) "Resolution" of a school township shall refer to a resolution adopted by the trustee and a majority of the advisory board, and of any other school corporation shall refer to a resolution duly adopted by its governing body.

SEC. 2. Subject to the limitations and procedure set out in this act, any school corporation may annex territory from any other school corporation by resolutions of the acquiring and losing school corporations as provided in Section 3, and any school city may annex territory from any other school corporation by its single resolution as provided in Section 4.

SEC. 3. An annexation may be effected by any school corporation as follows:

(a) Both the acquiring and the losing school corporations shall each adopt a substantially identical annexation resolution. This resolution shall contain the following items:

(1) A description of the annexed territory. Such description shall as near as reasonably possible be by streets and other boundaries known by common names and need not be in addition by legal description unless such additional description is necessary to identify the annexed territory. No notice shall be defective if there is a good faith compliance with this section and if the area designated may be ascertained with reasonable certainty by persons skilled in the area of real estate description.

(2) The time the annexation takes place. This may vary with respect to the different parts of the annexed territory; and if the entire annexed territory is contiguous to the acquiring corporation the parts of the annexed territory may be annexed so that some parts may not be contiguous to the annexed territory for temporary periods.

(3) Any terms and conditions facilitating education of pupils in the annexed territory, in the losing school corporation

or in the acquiring school corporation. Such terms may provide for, but shall not be limited to, the continued attendance by children in the annexed territory at schools in the losing school corporation for specified periods of time after annexation on a transfer basis. In such instances transfer tuition for such children shall be paid by the acquiring school corporation to the losing school corporation in the manner and at the rates now or hereafter provided by the statutes of the State of Indiana governing the computation and payment of transfer tuition costs.

(4) Disposition of assets and liabilities of the losing school corporation to the acquiring school corporation; allocation between the acquiring and losing school corporations of subsequently collected school taxes levied on property in the annexed territory; and the amount, if any, to be paid by the acquiring school corporation to the losing school corporation on account of property received from the latter. Such disposition, allocation, and amount shall be equitable.

(b) After the adoption of such resolution, notice shall be given by publication in both the acquiring and the losing school corporations setting out the text of the resolution, together with a statement that such resolution had been adopted and that a right of remonstrance exists as provided herein. It shall not be necessary to set out the remonstrance provisions of the statute, but a general reference to a right of remonstrance with a reference to the act shall be sufficient. The annexation shall take effect within thirty (30) days after such publication, or at the time provided in the resolution, whichever is later, unless within such period a remonstrance (based on a ground other than that set out in Section 6(a)(5) of this act) is filed in the circuit or superior court of the county where the annexed territory or any part thereof is located, by registered voters residing in the losing school corporation at least equal in number to the greater of the following: (a) ten per cent (10%) of the number of registered voters residing in the losing school corporation or (b) fifty-one

per cent (51%) of the number of registered voters residing in the annexed territory.

SEC. 4. An annexation may also be effected by any school city as follows:

(a) The acquiring school corporation shall adopt an annexation resolution of the type provided in Section 3. Unless the losing corporation shall consent, such resolution shall not provide a time for annexation prior to the July 1st succeeding the May 1st next succeeding the last publication of the notice of annexation.

(b) After the adoption of such resolution, the acquiring school corporation shall give notice of the type provided in Section 3 by publication in the acquiring school corporation and in the losing school corporation. It shall also give notice to the losing school corporation prior to the last publication of notice therein. The annexation shall take effect thirty (30) days after the last such publication in the losing school corporation or at the time provided in such resolution whichever is later, unless within such a period of remonstrance (based on a ground other than that set out in Section 6(a)(5) of this act) is filed in the circuit or superior court of the county where the annexed territory or a part thereof is located, by the losing school corporation, by not less than a majority of the owners of land in the annexed territory, or by the owners of seventy-five per cent (75%) or more in assessed valuation of the real estate in the annexed territory.

(c) For purposes of determining such ownership, the following rules shall apply: Only the record title holder or holders of any piece of property shall be an owner. Where record title of any single piece of property is in more than one person, all of them together shall constitute only one owner, and the remonstrance of any one of them shall constitute the remonstrance of all, whether or not authorized by the others.

SEC. 5. (a) The notice by publication required by Sections 3 and 4 shall be made two (2) times a week apart in two (2)

daily newspapers of general circulation, published in the English language and of general circulation in the acquiring school corporation and in the losing school corporation. Where there is only one or no such daily newspaper in either such school corporation, a weekly newspaper or newspapers may be used. Where there is only one such daily and/or weekly newspaper, publication in such paper shall be sufficient. Where any newspaper is of general circulation in both corporations, any publication in such newspaper shall qualify as one of the required publications in each of the school corporations. Publication may be made jointly by the losing and acquiring school corporations. The remonstrance period shall run from the second such publication.

(b) Where notice is to be given by an acquiring to a losing school corporation, it may be made either by registered or certified United States mail, return receipt requested, addressed to the governing board of the losing school corporation at its established business office, or addressed to the township trustee in the case of a school township, or addressed to the superintendent of schools or any officer of the governing body of any other school corporation.

Sec. 6. (a) A remsonstrance under either Sections 3 or 4 of this act shall be in the following or a substantially similar form:

The undersigned hereby remonstrate against the annexation of the following described territory situated in ..... County, Indiana, whereby it would be transferred from ..... ..... (the losing corporation) to ..... (the acquiring corporation):

(Description of the annexed territory sufficient to identify it.

The remonstrance may be filed in any number of counterparts. Each counterpart shall have attached to it the affidavit of the person circulating it that each signature appearing thereon was

affixed in his presence and is the true and lawful signature of the person who made it. The person who makes such affidavit need not be one of the persons who signs the counterpart to which it is attached. Such remonstrance shall be accompanied by a complaint filed by one or more of the remonstrators (who shall be treated as a representative of the entire class of remonstrators), and signed by such remonstrator or his attorney, stating the reasons for the remonstrance. Such reasons shall be limited to the following:

(1) There is a procedural defect in the manner in which the annexation is carried out which is jurisdictional.

(2) The annexed territory does not form a compact area abutting the acquiring corporation.

(3) The losing school corporation is left with no high school facilities, or its enrollment after annexation will be less than one thousand (1,000) pupils; provided, however, that such reasons for remonstrance shall not apply in a situation where the annexation includes all of the territory of the losing school corporation.

(4) The benefits to be derived from the annexation are outweighed by its detriments, taking into consideration the respective benefits and detriments to the schools and of the pupils residing in the acquiring school corporation, the losing school corporation, and the annexed territory.

(5) The disposition of assets and liabilities of the losing corporation, the allocation of school tax receipts between the two school corporations and the amount to be paid by the acquiring school corporation as set out in the annexation resolution are inequitable.

Except with respect to item (1), such allegations may be made in the statutory language.

(b) The plaintiff in such suit shall be the person whose name appears on the complaint and may be the losing school corporation in a remonstrance under Section 4. The defendants

in a remonstrance under Section 3 shall be both the acquiring and the losing corporations; and in a remonstrance under Section 4 shall be the acquiring school corporation. Service of process shall be made on the defendants as in other civil actions.

(c) For the purposes of determining whether the petition was timely filed: the time of filing shall be the time of filing with the clerk without regard as to the time of issuance of the summons; where the 30th day falls on Sunday, a holiday or any other day when the clerk's office is not open, the time shall be extended to the next day when such office is open.

(d) The issues in any remonstrance suit shall be made up by the complaint, the allegations thereof being deemed denied by each defendant. No responsive pleading need or may be filed except that any defendant may where appropriate file a motion to dismiss the suit on the ground (1) that the requisite number of qualified remonstrators have not signed the petition, (2) that the remonstrance was not timely filed, or (3) that the complaint does not state a cause of action. No responsive pleading to this motion need or may be filed. With respect to a motion under (1) and (2), the allegations thereof shall be deemed denied by the remonstrators. For purposes of determining whether there are the requisite number of qualified remonstrators, no person shall be entitled to withdraw his name after a remonstrance has been filed nor shall any person be entitled to add his name to such remonstrance. Any person may, however, at the trial of such cause and in support or derogation of the substantive matters in the complaint, introduce into evidence a verified statement that he wishes his name added to or withdrawn from the remonstrance. The court may either hear all or a part of the matters raised by the motion to dismiss separately or may consolidate for trial all or a part of such matters with the matters relating to the substance of the case. No complaint shall be dismissed for failure to state a cause of action, if a fair reading of the complaint makes out one of the grounds for remonstrance and suit provided in subsection (a) above. Amendment of the

complaint may be permitted in the discretion of the court if it does not state a new ground for remonstrance.

(e) The trial of a remonstrance suit shall be conducted as other civil cases by the court without the interevention of a jury on the issues raised by the complaint and/or motion to dismiss. A change of venue from a judge, but no change of venue from the county, will be permitted. The court will expedite the hearing of the case. Its judgment, except with respect to any matter raised under subsection (a)(5), shall be either (1) that the annexation shall take place, (2) that the annexation shall not take place, or (3) that the remonstrance shall be dismissed. In the event the court finds that the remonstrators have proved the reasons for the remonstrance described in any one of the first four numbered reasons for remonstrance under subsection (a), its judgment shall be that the annexation shall not take place; unless they have proved one of such four numbered reasons, its judgment shall be that the annexation shall take place. With respect to any matter raised under subsection (a)(5), its judgment may be either that the disposition, allocation and amount set out in the annexing resolution is equitable or that it is inequitable. In the latter event the court in its judgment shall provide for an equitable disposition allocation and amount. Costs shall follow judgment. Appeals may be taken from any judgment of the court in the same manner as appeals are taken in other civil cases.

SEC. 7. With respect to whether the disposition of the assets and liabilities of the losing school corporation, allocation of school tax receipts and the amount to be paid by the acquiring school corporation is equitable, the court shall be satisfied that the annexing resolution conforms substantially to the following standards:

(a) The acquiring school corporation shall assume a portion of all installments of principal and interest on any indebtedness of the losing school corporation (other than current obligations or temporary borrowing) which fall due after

the end of the last calendar year in which the losing school corporation is entitled to receive current tax receipts from property tax levies on the property on the annexed territory. Such portion shall consist of the following: (1) all such installments relating to any indebtedness incurred in connection with the acquisition or construction of any building located in the annexed territory, and (2) a proportion of all such installments relating to any other indebtedness which is the same proportion as the valuation of the real property in the annexed territory bears to the valuation of all the real property in the losing school corporation, as the same is assessed for general taxation immediately prior to annexation.

(b) The acquiring school corporation shall make the payments and assume the obligations provided for a school corporation acquiring territory and/or building or buildings under Chapter 264, Acts 1953.

(c) Unless the losing school corporation shall consent to some other allocation: the portion of the special school and tuition fund monies collected by the losing school corporation shall not be allocated in a greater amount to the acquiring school corporation than would be awarded if such two corporations were respectively the "original school corporation" and the "annexing school corporation" within the meaning of Chapter 112, Acts 1957 as heretofore amended; and the amount to be paid the losing corporation by the acquiring school corporation on account of the acquisition by the acquiring school corporation of a building in the annexed territory shall not be less than would be awarded if such two school corporations were respectively the "acquiring corporation" and "original school corporation" within the meaning of Chapter 89, Acts 1959.

(d) Where the annexed territory includes all of any losing school corporation, the acquiring school corporation shall acquire all of the property and assets of the losing school corporation without making payment of any nature for the same

and shall assume all of the liabilities and obligations of the losing school corporation.

SEC. 8. (a) In the event any remonstrance is filed on any ground other than that set forth in Section 6(a)(5), annexation shall not become effective until final judgment in the remonstrance suit. Judgment shall not be considered to be final until the time for taking an appeal has expired, or, if an appeal is taken within such time, until final judgment in the appeal. A judgment of the trial court dismissing a remonstrance shall be considered to be a final judgment, subject to the provisions of the preceding sentence. In the event such judgment is against the annexation, no further annexation of the annexed territory may take place for a period of two (2) years from the date such remonstrance was filed. This shall not, however, prevent either the acquiring or the acquiring and losing school corporations from rescinding the annexation resolution; and in such event the suit shall be dismissed without prejudice. In such latter event such two (2) year prohibition shall not apply unless a subsequent annexation resolution is adopted primarily for the purpose of harassment and not for some other purpose, such as the correction of procedural irregularities or a substantial change in the annexed territory and/or the annexation resolution.

(b) Where the remonstrance relates solely to any matter raised under Section 6(a)(5) the annexation shall take effect at the time provided under Sections 3 or 4.

SEC. 9. (a) Whenever the boundaries of any civil city are extended by a civil annexation which becomes effective as of a date subsequent to the effective date of this act, the boundaries of the school city which has jurisdiction over the area of such civil city or the major portion thereof shall be correspondingly extended by virtue of such civil annexation, subject only to the further provisions of this Section. Every such extension of the boundaries of a school city shall become finally effective on

the occurrence of that one of the three following events that is the first to occur:

(i) The expiration of that period of time within which, under the provisions of Section 243, Chapter 129, Acts 1905, as amended, an appeal from the civil annexation may be filed, if, within such period, no such appeal is taken.

(ii) The expiration of that period of time within which, after the circuit or superior court in which there has been filed an appeal from the civil annexation has decided such appeal adversely to the remonstrator or remonstrators, an appeal from such decision of the circuit or superior court may be taken by the losing party, if, within such period, no such appeal from such decision of the circuit or superior court is taken.

(iii) If an appeal from such decision of the circuit or superior court is taken, the rendition of a final judgment adverse to the remonstrator or remonstrators, in the appeal. The date as of which, under the foregoing provisions of this Section, a civil annexation becomes finally effective to extend the boundaries of a school city shall also be deemed to be the date of "annexation," the "time of annexation," or the date on which "annexation occurs," whenever the determination of such date or such time shall be required for the application of any of the provisions of Chapter 112, Acts 1957, as amended, or of Chapter 89, Acts 1959, as amended.

(b) Whenever after the effective date of this act the governing body of a civil city shall adopt an ordinance effecting such a civil annexation as is described in Section 9(a) of this act, the losing school corporation shall have the right, notwithstanding any agreement signed by it under Section 7, Chapter 160, Acts 1953, or any similar agreement to remonstrate against, and appeal from, such civil annexation under the provisions of Section 243 of Chapter 129, Acts 1905, as amended. Such right shall be exercised in the same manner as the right to remonstrate and appeal given by said Section to the owners of real estate

in the annexed territory. In the event a losing school corporation shall exercise the right of appeal hereby given, but only in such event, the following additional condition shall be a primary determinant of the annexation's merit and shall be the only determinant to be considered by the court with reference to the merit of the remonstrance of the losing school corporation:

The benefits to be derived from the annexation outweigh the detriment, (including but not limited to the benefits and detriments to schools and educational welfare), taking into consideration the respective benefits and detriments to the residents of the civil city, the school city, the losing school corporation, and the annexed territory. If the judge of the court shall find that such primary determinant does not apply to an annexation against which a losing school corporation shall remonstrate, the annexation shall not take place. Nothing in this Section shall be construed to diminish the primary determinants now set out in said Section 243 with reference to remonstrances filed by parties other than the losing school corporation.

c) Whenever after the effective date of this act the governing body of a civil city shall adopt an ordinance effecting such a civil annexation as is described in Section 9(a) of this act, the school city and the losing school corporation shall have power to agree that none, or only a part, of the territory affected by such civil annexation shall become, by virtue of such civil annexation, a part of the school city. Every such agreement shall be embodied in a substantially identical resolution adopted by the school city and by the losing school corporation, and notice of the adoption of such resolution shall be published within the time fixed by Section 243 of Chapter 129, Acts 1905, as amended, for the taking of an appeal from a civil annexation. Such publication of notice shall be made in the manner provided in Section 5(a) of this act. Whenever such an agreement with respect to a civil annexation shall have been entered into, the losing school corporation shall be deemed thereby to have

waived the right, which is given by Section 9(b) of this act, to remonstrate against an appeal from such annexation.

(d)(i) If, on the effective date of this act, the governing body of a civil city shall have adopted an ordinance effecting such a civil annexation as is described in Section 9(a) of this act, which civil annexation is then subject to, or the subject of, such an appeal as is provided for in said Section 243 of Chapter 129, Acts 1905, as amended, then, in such event, the losing school corporation shall have no right to appeal from such civil annexation, notwithstanding the provisions of Section 9(b) of this act, and the boundaries of the school city shall be deemed to be extended to include the territory involved in such civil annexation, the effective date of such extension to be determined in accordance with Section 9(a) of this act.

(ii) Nothing in this act shall be deemed to affect directly, indirectly, or by implication the question whether any civil annexation that became finally effective prior to the effective date of this act resulted in the extension of the boundaries of any school city.

SEC. 10. All laws or parts of laws in conflict herewith are hereby repealed. This act shall not, however, be construed to repeal any part of Chapter 202, Acts 1959, or any act concerning the consolidation of two or more school corporations, to which this act shall be supplementary, except to the extent that said Chapter 202 conflicts with the subsequent provisions of this section. No annexation that is undertaken pursuant to, or that results by operation of, any Section of this act shall require, for its effectiveness, any approval of any county committee or state commission or committee created pursuant to, or referred to in, said Chapter 202, Acts 1959. The provisions of Section 9 of this act shall operate after the effective date of this act both before and after a final plan has been put into effect by election, petition or other proceeding under the provisions of said Chapter 202 or any other act concerning the consolidation of two or more school corporations.

SEC. 11. If any provision of this act or the application thereof to any person or circumstances is invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

SEC. 12. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in full force and effect from and after the passage.

INDIANA ACTS 1969, Ch. 52, pp. 57-58.

CHAPTER 52.

[S. 153. Approved February 25, 1969.]

AN ACT amending an Act concerning school corporations.

*Be it enacted by the General Assembly of the State of Indiana:*

SECTION 1. Acts 1961, c. 186, s. 4 is amended to read as follows: Sec. 4. An annexation may also be effected by any school city as follows:

(a) The acquiring school corporation shall adopt an annexation resolution of the type provided in Section 3. Unless the losing corporation shall consent, such resolution shall not provide a time for annexation prior to the July 1st succeeding the May 1st next succeeding the last publication of the notice of annexation.

(b) After the adoption of such resolution, the acquiring school corporation shall give notice of the type provided in Section 3 by publication in the acquiring school corporation and in the losing school corporation. It shall also give notice to the losing school corporation prior to the last publication of notice therein. The annexation shall take effect thirty (30) days after the last such publication in the losing school corporation or at the time provided in such resolution whichever is later, unless within such a period a remonstrance (based on

a ground other than that set out in Section 6(a)(5) of this act) is filed in the circuit or superior court of the county where the annexed territory or a part thereof is located, by the losing school corporation, by not less than a majority of the owners of land in the annexed territory, or by the owners of seventy-five per cent (75%) or more in assessed valuation of the real estate in the annexed territory.

(c) For purposes of determining such ownership, the following rules shall apply: Only the record title holder or holders of any single piece of property shall be an owner. Where record title of any single piece of property is in more than one person, all of them together shall constitute only one owner, and the remonstrance of any one of them shall constitute the remonstrance of all, whether or not authorized by the others.

SEC. 2. Acts 1961, c. 186, s. 9 is repealed as to all annexations which have not become effective or finally effective prior to the effective date of this act.

SEC. 3. Acts 1961, c. 186 is amended by adding a new and additional section to be numbered Section 9a and to read as follows: Sec. 9a. Notwithstanding any act which provides in substance that the boundaries of any school city or school town are coterminous or coextensive with the boundaries of any civil city or civil town, the boundaries of a school city (as such term is defined in this act) shall be changed after the effective date of this act in 1961 solely by an annexation in accordance with the terms of this act in effect at the time such annexation is effective or finally effective.

SEC. 4. Acts 1961, c. 186, s. 10 is hereby amended to read as follows: Sec. 10. All laws or parts of laws in conflict herewith are hereby repealed. This act shall not, however, be construed to repeal any part of Chapter 202, Acts 1959, or any act concerning the consolidation of two or more school corporations, to which this act shall be supplementary, except to the extent that said Chapter 202 conflicts with the subsequent provisions of this

section. No annexation that is undertaken pursuant to, or that results by operation of, any Section of this act shall require, for its effectiveness, any approval of any county committee or state commission or committee created pursuant to, or referred to in, said Chapter 202, Acts 1959. The provisions of Section 9 of this act, with respect to any annexation which is finally effective prior to the effective date of the act amending this section in 1969, shall operate after the effective date of this act both before and after a final plan has been put into effect by election, petition or other proceeding under the provisions of said Chapter 202 or any other act concerning the consolidation of two or more school corporations.

SEC. 5. If any provision of this act or the application thereof to any person or circumstances is invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

SEC. 6. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in full force and effect from and after the passage.

INDIANA ACTS 1969, Ch. 173, pp. 357-448 (Consolidated First Class Cities and Counties Act, also known as "Uni-Gov Act").

CHAPTER 173.

[S. 543. Approved March 13, 1969]

AN ACT concerning reorganization of government in counties containing a city of the first class.

*Be it enacted by the General Assembly of the State of Indiana:*

## ARTICLE I—TITLE DEFINITIONS AND APPLICABILITY OF ACT

SECTION 101. Reference to Act. This Act shall be known and may be cited and referred to as the "Consolidated First-Class Cities and Counties Act".

SEC. 102. Definitions. As used in this Act, the following terms shall have the following meanings:

(a) "City of first class" shall be a city of the first class as defined in Acts 1933, c. 233, s. 1.

(b) "County" shall be any county in this State in which there is one but not more than one city of the first class and no city of the second class.

(c) "First Class City" shall be the city of the first class located in a County.

(d) "Excluded City" shall mean any city other than a First Class City in the County and any town in the County having a population in excess of 5,000 inhabitants according to the last preceding United States decennial census.

(e) "Included Town" means any town having a population of less than 5,000 inhabitants according to the last preceding United States decennial census, all or any part of which is located in the county.

(f) "Consolidated City" shall be a body corporate, created by this Act, and including within its boundaries all of the territory of a First Class City and of the County, except for the territory located in Excluded Cities; Provided, however, That certain departments and special taxing districts of the Consolidated City may have jurisdiction as provided in this Act in territory greater or less than such territorial boundaries. The Consolidated City shall be a city and shall be a city of the first class within the meaning of all laws of the State.

(g) "Mayor" shall be the chief executive officer of the Consolidated City with the powers provided herein.

(h) "City-County Council" shall be the principal legislative body of the Consolidated City and of the County with the powers provided herein.

(i) "Departments" of the Consolidated City and "Divisions" of such Departments are organizational units of the Consolidated City, the chief executive officers of which have the duties and powers assigned or authorized to be assigned under this Act. The chief executive officers of each Department and any Division thereof shall, except where they are otherwise styled in this Act, be known respectively as "Director" and "Administrator".

(j) "Member" shall refer to the member of any council, board or commission set up hereunder; unless otherwise styled the presiding officer thereof shall be the chairman.

(k) A "Special Taxing District" of the Consolidated City shall be a district of less, equal or greater territorial limits than the boundary of the Consolidated City, in which the property owners thereof bind themselves, pursuant to the procedures authorized herein or heretofore authorized by applicable law, for the construction and maintenance of a local public improvement for the use of those who receive the benefit thereof; and projects may include, but shall not be limited to the construction of storm sewers, sanitary sewers, flood control, drainage and water

course improvements, parks, redevelopment projects, thoroughfares, roads and any other project permitted under applicable law for a special taxing district of a city of the first class or the Consolidated City.

(l) A "Special Service District" of or operating in connection with the Consolidated City shall be a district within the Consolidated City or the County formed, created or authorized to be created under this Act for the purpose of providing the property owners therein with a service or services; it shall be administered under the administrative structure of the Consolidated City in accordance with this Act, but shall be a separate body corporate, without, however, the power to issue general obligation bonds.

(m) A "Special Service District Council" shall be comprised of the members of the City-County Council elected from all those districts which encompass any part of a Special Service District.

(n) Where any employee, officer or member of a board or commission serves as "at the pleasure of" or "may be removed by" any appointing or hiring officer, employee or body, such person shall have no relief judicial or otherwise by reason of his termination or removal.

(o) Reference to "law" or "laws" shall mean the applicable statutes, including but not limited to this Act, and any regulations related to such statutes, adopted before or after the effective date of this Act, on any subject, as for example, in the phrases "in accordance with applicable law", "permitted by law" or "authorized by law".

(p) A reference to any statute by the year adopted and the chapter number, as for example, Acts 1905, c. 129, or to a section of any statute, as for example, Acts 1905, c. 129, s. 53, shall refer to such act or section, any amendments thereto, and any statute or statutes which repeal, supplement or supersede such statute or section, adopted before or after the effective date of this Act.

(q) An "article" of this Act shall refer to the section or group of sections commencing with the same digit or digits, disregarding the last two digits to the right, as for example, sections 101, 201 or 1001, each of which would be in a separate article, or sections 101, 102 or 103 which would be in the same article.

(r) "This Act" shall refer to this Act as originally enacted or hereafter amended.

(s) The "effective date of this Act" shall refer to the effective date for the taking effect of its various sections or articles provided in Article XV.

SEC. 103. Applicability. At the time or times provided in Article XV of this Act: a Consolidated City which shall be a municipal body corporate shall be formed in each County (as defined herein); the Consolidated City, its Departments, Special Taxing Districts and Special Service Districts shall have the territorial jurisdictions and the duties and powers provided in this Act and the First Class shall be merged into the Consolidated City and the First Class City shall be abolished as a separate entity.

SEC. 104. Identification. The Consolidated City shall be known as "City of .....". In such blank shall be inserted the name of the First Class City.

## ARTICLE II—POWERS OF THE CONSOLIDATED CITY

SEC. 201. General. The Consolidated City and its Departments, and its Special Taxing Districts and Special Service District where powers are delegated to them under this Act, shall have the powers set out in the subsequent sections of this article and otherwise provided in this Act. The Consolidated City and its Special Service Districts shall be municipal corporations with power to sue and be sued.

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## ARTICLE III—OFFICERS OF THE CONSOLIDATED CITY AND THE COUNTY.

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SEC. 314. Existing Boards, Agencies and Commissions. At the time all or substantially all of the power and duties of any agency, board or commission of a First Class City are transferred under the terms of this Act to any Departments, Special Taxing Districts or Special Service Districts of the Consolidated City, such agency, board or commission of the First Class City shall be abolished.

At the time the power and duties to perform any function is transferred from any agency, board or commission of the First Class City, the County or any body corporate to the Consolidated City, or any Department, Special Taxing District or Special Service District thereof, the property, records, personnel, contracts and all other rights and liabilities thereof related to such function, including all rights and obligations arising under any pension or retirement plan or fund, shall be similarly transferred except as follows: (1) the City-County Council may by ordinance direct a different repository therefor; (2) general obligation bonds or other indebtedness of the First Class City or indebtedness assumed by the First Class City, other than bonds or indebtedness relating to the function of a Special Service District, shall be binding upon and obligations of the Consolidated City; (3) bonds or indebtedness relating to any function transferred to a Special Service District shall be binding upon and obligations of the Consolidated City; (4) bonds and indebtedness of any special taxing district shall be the obligation of the Special Taxing District which continues the function of the special taxing district on account of which such bonds and indebtedness were issued. Nothing in this Act shall be construed to impair the obligation of any indebtedness or contract existing on the effective date of this Act.

All proceedings and petitions pending before any board, commission or other agency at the effective date the powers thereof are transferred under the terms of this Act shall be transferred to the official, board, commission or agency who would have the power to act upon such proceeding or petition under the terms of this Act.

All other municipal corporations, boards, agencies and commissions created by applicable law, or by any ordinance until such ordinance is amended, shall not be affected by this Act, except to the extent that such powers are transferred to the Consolidated City or Department thereof or are otherwise limited under this Act. Without limiting the generality of the following enumeration, such municipal corporations, boards, agencies, authorities and commissions shall include: airport authority and board established pursuant to Acts 1961, c. 293; health and hospital corporation and board established pursuant to Acts 1951, c. 287; county department of welfare and board established pursuant to Acts 1936 (Spec. Sess.), c. 3; county home board established pursuant to Acts 1955, c. 119; building authority, board of trustees and board of directors established pursuant to Acts 1953, c. 54; capital improvements board of managers established pursuant to Acts 1965, c. 326; housing authority established pursuant to Acts 1937, c. 207, except to the extent expressly limited or changed by Article VIII of this Act; library districts and boards thereof established pursuant to Acts 1947, c. 321; and any school corporation, all or a part of the territory of which is in the Consolidated City or County. Where, however, after the effective date of this Act, the power to make an appointment to the governing body or any other board connected with such board, agency or commission, or the power to take any action in connection with the operation of such board, agency or commission, is vested in the County Council of the County or the Common Council of the First Class City, such power shall be vested in the City-County council.

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ARTICLE IX—DEPARTMENT OF PUBLIC WORKS

SEC. 901. Director. The chief administrative officer of the Department of Public Works shall be a Director.

SEC. 902. Powers of Department. Except as otherwise provided in this Act, the Department of Public Works shall have all of the authority, power, rights, duties, liabilities, obligations and responsibilities now or hereafter granted by law to:

(a) The Department of Public Sanitation and Board of Sanitary Commissioners of the First Class City, including but not limited to Acts 1917, c. 157; Acts 1947, c. 157; Acts 1951, c. 179; Acts 1955, c. 236; Acts 1957, c. 43; Acts 1959, c. 281; and Acts 1967, c. 1. Any existing sanitary district created by any such statutes shall continue as a Special Taxing District of the Consolidated City, with boundaries which are the same as the boundaries of such district on the effective date of this Act. Such boundaries of the Special Taxing District shall not automatically be extended by this Act to the boundaries of the Consolidated City, but additional territory shall be incorporated into such District in the manner prescribed by Acts 1917, c. 157, with the Board of Public Works exercising the power of incorporation of territory of the board of sanitary commissioners under such statute, with the additional requirement that any such incorporation shall be approved by resolution of the City-County Council.

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ARTICLE XII—DEPARTMENT OF PUBLIC SAFETY.

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SEC. 1206. Definitions. As used in Sections 1206 through 1233 of this Article, the following words and phrases shall have the following meanings:

(a) "Consolidated City Police Force" or "Force" shall mean the Police Division of the Department created under this Act.

(b) "Police Special Service District" shall mean a Special Service District in which the Consolidated City Police Force created under this Article shall have jurisdiction. At the effective date of this Act such Police Special Service District shall be coterminous with the boundaries of the First Class City as the same existed on the day preceding the effective date of this Act, but may be expanded by the City-County Council in accordance with this Article. At the time that the boundaries of such Police Special Service District become coterminous with the boundaries of the Consolidated City, the Police Special Service District may be dissolved by the Director and such District shall be a Department of the Consolidated City.

(c) "Advisory Commission" shall mean the Consolidated City Police Advisory Commission created under this Act.

(d) "Chief" shall mean the chief executive officer of the Consolidated City Police Force who is appointed pursuant to this Act.

(e) "Merit Board" shall mean the Consolidated City Police Force Merit Board appointed under this Act.

(f) "Interview Board" shall mean the Consolidated City Police Force Interview Board appointed under this Act.

(g) "Member of the Police Force" shall mean a regularly employed police officer of the Force.

SEC. 1207. Police Division. The Police Division of the Department shall be known as the Consolidated City Police Force of ..... The authority and jurisdiction of such Consolidated City Police Force shall extend throughout the territory of the Police Special Service District, as the same may exist from time to time, and the Sheriff and the Sheriff's department of the county shall continue to have the same authority and jurisdiction as presently exists for the Sheriff of such County until such Police Special Service District is extended as provided in Section 1208 of this Article.

After extension of the Force to include the entire Consolidated City, the duties of the County Sheriff shall consist of carrying out his civil functions, maintaining order in the courts and at public hearings, enforcing the process and order the prisoners therein, transporting prisoners and maintaining the security of public property, including but not limited to the County Home, Juvenile Center and Guardian's Home and the Sheriff may appoint deputies for the purpose of assisting him in performing these duties.

SEC. 1208. Extension of Police Special Service District. The City-County Council is hereby empowered to extend by ordinance or resolution the boundaries of the Police Special Service District, and the authority and jurisdiction of the Consolidated City Police Force, to include the entire Consolidated City or any part thereof not initially in the Police Special Service District, after a public hearing and determination by said Council that reasonable and adequate police protection can be provided within such expanded area by the City Police Force and that extension of such boundaries is in the public interest of the citizens of the Consolidated City. After action by the City-County Council extending the authority and jurisdiction of this Consolidated City Police Force to include the entire Consolidated City, the territorial jurisdiction and powers of the Consolidated City Police Force shall extend throughout the Consolidated City. Any Included Town, whether or not within the territorial limits of the Police Special Service District, may retain or appoint such law enforcement officer or officers as it may choose, but the powers and jurisdiction thereof shall be subordinate to those of the Consolidated City Police Force after inclusion of the territorial area of such town within the Special Police Service District. Any special police, or marshal, who act in any law enforcement capacity, including but not limited to escort service and traffic direction, and who are not members of the Consolidated City Police Force shall wear uniforms that are distinctly

different from the uniforms worn by members of the Consolidated City Police Force.

The City-County Council shall also be empowered to expand the territorial area of the Police Special Service District from time to time to include less than all of the Consolidated City, and in the event of such expansion the Consolidated City Policy Force shall exercise jurisdiction within such expanded territorial area and the same shall become a part of the Police Special Service District.

Any Excluded City within such county may by adoption of an ordinance by the governing body of such Excluded City at any time after this Act becomes law and by the concurrence therein of the City-County Council, become a part of the Police Special Service District. Any such Excluded City which does not determine to become a part of the Police Special Service District shall retain full control of its police force. A determination to join the Police Special Service District shall be permanent and irrevocable.

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SEC. 1234. Definitions. As used in Section 1234 through 1243 of this Article, the following words and phrases shall have the following meanings:

(a) "Consolidated City Fire Force" or "Force" shall mean the Fire Division of the Department created under this Article.

(b) "First Special Service District" shall mean a Special Service District in which the Consolidated City Fire Force created under this Article shall have jurisdiction. At the effective date of this Article, such Fire Special Service District shall be coterminous with the boundaries of the First Class City as the same shall have existed on the day preceding the effective date of this Act, but may be expanded by the City-County Council in accordance with this Article. At the time that the boundaries of such Fire Special Service District become coterminous with the boundaries of the Consolidated

City, the Fire Special Service District may be dissolved by the Director and such department shall be a Department of the Consolidated City.

(c) "Advisory Commission" shall mean the Consolidated City Fire Advisory Commission created under this Article.

(d) "Chief" shall mean the Chief Executive Officer of the Consolidated City Force who is appointed pursuant to this Article.

(e) "Merit Board" shall mean the Consolidated City Fire Force Merit Board appointed under this Article.

(f) "Interview Board" shall mean the Consolidated City Fire Force Interview Board appointed under this Article.

(g) "Member of the Fire Force" shall mean a regularly employed fireman of the Force.

SEC. 1235. Fire Division. The Fire Division of the Department shall be known as the Consolidated City Fire Force of ..... The authority and jurisdiction of such Consolidated City Fire Force shall extend throughout the territory of the Fire Special Service District, as the same may exist from time to time, and the Township Trustee of townships within the Consolidated City but outside the Fire Special Service District, shall continue to have the same authority and jurisdiction relating to fire protection as presently exists for the Trustee of such Township.

SEC. 1236. Extension of Fire Special Service District. The City-County Council is hereby empowered to extend by ordinance or resolution the boundaries of the Fire Special Service District and the authority and jurisdiction of the Consolidated City Fire Force to include the entire Consolidated City, or parts thereof not initially in the Fire Special Service District, after a public hearing and determination by said Council that reasonable and adequate fire protection service can be provided within such expanded area by the Consolidated City Fire Force and that extension of such boundaries

is in the public interest, in accordance with the following procedure:

Petitions to include any area of the Consolidated City within the Fire Special Service District shall be submitted to the Department of Metropolitan Development for study and recommendation. Petitions shall be initiated by a majority of owners of real property, or by owners of real property amounting to seventy-five percent (75%) in assessed valuation, in the area to be included.

The Department of Metropolitan Development shall make findings of fact and recommendations and shall serve a copy thereof upon the Chief, the township trustee in the township affected and the petitioners, thirty (30) days prior to a hearing before the City-County Council. If the City-County Council expands the territorial area of the Fire Special Service District, thereby extending the authority and jurisdiction of this Consolidated City Fire Force, to include an additional part of the Consolidated City not within the Fire Special Service District upon the effective date of this Act, all existing city and town fire and local fire protection agencies and departments shall cease to function or have any territorial jurisdiction within such territorial area and the same shall be added to and become a part of the Fire Special Service District.

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## ARTICLE XIV—FINANCES

SEC. 1401. Receipt of Funds. In order to provide funds for the carrying out of the duties, powers and obligations of the Consolidated City, its Special Taxing Districts and its Special Service Districts, established by this Act, the Consolidated City shall receive the following money on and after the effective date of this Act, which shall be paid over to it as it becomes available:

(1) Any and all money collected from the levies of taxes or special taxes on property or otherwise as provided by applicable law.

(2) The aggregate of allocated amounts of money collected and available for distribution to the Consolidated City, and the County, in the Motor Vehicle Highway Account Fund of the State as provided in Acts 1941, c. 168. For purposes of determining the allocable portions of the Consolidated City and of the County, the population of the Consolidated City shall consist of the population within the boundaries of the Fire Special Service District created by this Act and the miles of county roads shall include all roads maintained by the Consolidated City outside of the boundaries of the Fire Special Service District.

(3) Any and all public money, whether held in general accounts, special accounts, trusts or otherwise, or receivable by the County, the Mass Transportation Authority, the Consolidated City, its Departments, Special Taxing Districts or Special Service Districts, which were budgeted or made available for functions conferred upon the Consolidated City, its Departments or such Districts.

(4) Any and all money available or which shall become available from the federal government or any federal agency created and organized for the disbursement or allocation of federal funds in furtherance of powers conferred upon the Consolidated City, its Departments or Districts.

(5) Any and all money that may be appropriated by law in furtherance of the powers conferred upon the Consolidated City.

(6) Any and all money received as proceeds from the sale of bonds by the Consolidated City or its Special Taxing Districts.

(7) And and all money held or collected by the First Class City, the County or the Mass Transportation Authority pursuant to Acts 1965, c. 208, and Acts 1967, c. 311.

(8) Any and all money received by the Consolidated City from the exercise of its powers or control and use of its property.

(9) Any and all money in the Cigarette Tax Fund of the State available for distribution to the First Class City or any separate authority within the County shall be distributed as follows: All amounts appropriated to the Capital Improvement Board of Managers of the County Pursuant to Acts 1947, c. 222, and Acts 1967, c. 296, shall be paid and handled as prescribed and provided by such Acts. All amounts distributable to a transportation authority pursuant to Acts 1947, c. 222, or Acts 1967, c. 311, shall be paid to the Treasurer of the County for the use of the Department of Transportation. Any money distributable to the Consolidated City for the use of the General Fund thereof shall be paid to the Consolidated City.

(10) The aggregate of allocated amounts of money collected and available for distribution to the Consolidated City or to the County, other than Excluded Cities, pursuant to Acts 1955, c. 67, pertaining to alcoholic beverages fees and taxes.

(11) Any other funds available for distribution by the State under any applicable law, in accordance with the terms thereof.

For purposes of determining population of the Consolidated City as respects any allocation or right to receive funds under this Section based upon population, and for all purposes under Acts 1935, c. 226, and Acts 1965, c. 386, the population of the Consolidated City shall be deemed the population of the Fire Special Service District. For purposes of Acts 1935, c. 226, all parts of the Consolidated City outside the Fire Special Service District and not inside the limits of an Included Town shall be deemed outside the limits of a city or town.

INDIANA ACTS 1937, Ch. 207, pp. 1034-1055 (Housing Authority Act), as amended by INDIANA ACTS 1965, Ch. 384, pp. 1185-1192.

Sec. 3. Definitions. The following terms, wherever used, or referred to in this act, shall have the following meaning, unless the context clearly requires otherwise:

* * * * *

(d) The "governing body" shall mean, in the case of a city, the common council, in the case of a town, the town board of trustees, and in the case of a county, the county council.

* * * * *

(g) Area of operation: (1) In the case of a housing authority of a city or town shall include such city or town and the area within five miles of the territorial boundaries thereof; Provided, however, That the area of operation of a housing authority of any city or town shall not include any area which lies within the territorial boundaries of such other city as herein defined; (2) In the case of a housing authority of a county, shall include all of the county, except that portion which lies within the territorial boundaries of any city or town as herein defined.

INDIANA ACTS 1937, Ch. 209, pp. 1058-1063 (Housing Cooperation Act).

Sec. 2. Finding and declaration of necessity. It has been found and declared in the Housing Authorities Law that there exists in the state unsafe and insanitary housing conditions and a shortage of safe and sanitary dwelling accomodations for person of low income; that these conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety, fire and accident protection, and other public services and facilities; and

that the public interest requires the remedying of these conditions. It is hereby found and declared that the assistance herein provided for the remedying of the conditions set forth in the Housing Authorities Law constitutes a public use and purpose and an essential governmental function for which public moneys may be spent, and other aid given; that it is a proper public purpose for any state public body to aid any housing authority operating within its boundaries or jurisdictions or any housing project located therein; as the state public body derives immediate benefits and advantages from such an authority or project; and that the provisions hereinafter enacted are necessary in the public interest.

* * * * *

Sec. 4. Cooperation in housing projects—Powers of municipal corporation. For the purpose of aiding and cooperating in the planning, undertaking, construction or operation of housing projects located within the area in which it is authorized to act, any municipal corporation may upon such terms, with or without consideration, including but not limited to the following:

* * * * *

(c) Enter into agreements (which may extend over any period, notwithstanding any provision or rule of law to the contrary), with a housing authority or the federal government respecting action to be taken by such municipal corporation pursuant to any of the powers granted by this act; * * *

UNITED STATES CODE, Title 42, § 1415.

In order to insure that the low-rent character of housing projects will be preserved, and that the other purposes of this chapter will be achieved, it is provided that—

* * * * *

Local responsibilities and determinations.

(7) In recognition that there should be local determination of the need for low-rent housing to meet needs not being adequately met by private enterprise—

* * * * *

(b) The Authority shall not make any contract for loans (other than preliminary loans) or for annual contributions pursuant to this chapter with respect to any low-rent housing project initiated after March 1, 1949, (i) unless the governing body of the locality involved has entered into an agreement with the public housing agency providing for the local cooperation required by the Authority pursuant to this chapter; * * *